Petition

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81-625

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF MISSOURI,
Petitioner,

v.

ROBERT LEE HAGGARD,
Respondent,

(listed on inside cover are twenty-two cases also joined in this petition as per Rule 19.4)

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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Also joined in this petition as per Rule 19.4 are the following cases:

STATE OF MISSOURI,
Petitioner,
v.
DONNIE L. COLLINS,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
BOBBY JOE McGEE,
Respondent,

STATE OF MISSOURI,
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v.
STANLEY G. HELTON,
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STATE OF MISSOURI,
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v.
MICHAEL L. WHITE,
Respondent,

STATE OF MISSOURI,
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RANDY LEE SINCLAIR,
Respondent,

STATE OF MISSOURI,
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v.
MARLON PAYNE,
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STATE OF MISSOURI,
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TIMOTHY CREWS,
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STATE OF MISSOURI,
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DONALD GREER,
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STATE OF MISSOURI,
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v.
WILLIE TUNSTALL,
Respondent,

STATE OF MISSOURI,
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WILLIAM BROWN,
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STATE OF MISSOURI,
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TERRY GENE CREWS,
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STATE OF MISSOURI,
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JACKIE MARTIN,
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STATE OF MISSOURI,
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ROBERT LOWERY,
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STATE OF MISSOURI,
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ROLLAN ANTHONY WILLIAMS,
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STATE OF MISSOURI,
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TOMMY BRYANT KENDRICK,
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CARL FLETCHER,
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STATE OF MISSOURI,
Petitioner,
v.
JOHNNY WILLIAMS,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
HANSFORD GASKIN,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
WALLACE D. COUNSELMAN, JR.,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
EDWARD H. PENNINGTON, JR.,
Respondent,

QUESTIONS PRESENTED

1. Whether the double jeopardy clause of the Fifth Amendment to the United States Constitution is violated by convicting a defendant, in one proceeding, of both armed criminal action, § 559.225, RSMo Supp. 1976, and its predicate felony, where the proof required to establish a violation of the latter is necessarily required to prove a violation of the former?

2. Whether the Missouri Supreme Court is bound by *Brintley* v. *Michigan*, 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979), a decision of this Court dismissing an appeal (wherein the same federal constitutional issue was raised) for want of a substantial federal question?

3. Whether the Missouri Supreme Court's most recent decision in *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc 1980), wherein that court held that convicting a defendant in a single proceeding of both first degree robbery and armed criminal action violates the double jeopardy clause of the Fifth Amendment to the United States Constitution, conflicts with this Court's decision in *Brintley* v. *Michigan*, 444 U.S. 948, 100 S.Ct. 418, 62 L.ED.2d 317 (1979); therein this Court dismissed, for want of a substantial federal question, an appeal which sought to review the Michigan Supreme Court's decision holding that the double jeopardy clause of the Fifth Amendment to the United States Constitution was not violated by convicting a defendant in a single proceeding of both armed robbery, § 750.593, M.C.L.A., and possession of a firearm during the commission of a felony, § 750.227(b), M.C.L.A.

4. Whether the Missouri Supreme Court's most recent decision in *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc 1980), conflicts with this Court's decisions rendered in *Whalen* v. *United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715

(1980), and *Albernaz* v. *United States*, 450 U.S. ——, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981)?

5. Whether the Missouri Supreme Court's recent decision in *State* v. *Haggard*, No. 62227 (Mo. banc July 14, 1981), conflicts with this Court's recent decision in *Albernaz* v. *United States*, 450 U.S. —, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981)?

6. Whether the Missouri Supreme Court's decision in *State* v. *Haggard*, No. 62227 (Mo. banc July 14, 1981) (addressing six outstanding Orders of this Court), is adequately responsive to the Orders issued by this Court in *Missouri* v. *Counselman*, No. 80-754 (March 23, 1981); *Missouri* v. *Greer*, No. 80-997 (May 26, 1981); *Missouri* v. *Sinclair*, No. 80-1166 (June 8, 1981); *Missouri* v. *Brown*, No. 80-1368 (March 30, 1981); *Missouri* v. *Crews*, No. 80-1393 (June 22, 1981); and *Missouri* v. *Lowery*, No. 80-1561 (June 8, 1981)?

PARTIES

In the Missouri Supreme Court, the parties were as follows:

State of Missouri, respondent, and Robert Lee Haggard, appellant, in cause No. 62227;

State of Missouri, respondent, and Donnie L. Collins, appellant, in cause No. 63148;

State of Missouri, respondent, and Stanley G. Helton, appellant, in cause No. 63230;

State of Missouri, respondent, and Randy Lee Sinclair, appellant, in cause No. 63231;

State of Missouri, respondent, and Timothy Crews, appellant, in cause No. 63227;

State of Missouri, respondent, and Willie Tunstall, appellant, in cause No. 63229;

State of Missouri, respondent, and Terry Gene Crews, appellant, in cause No. 63228;

State of Missouri, respondent, and Robert Lowery, appellant, in cause No. 62710;

State of Missouri, respondent, and Rollan Anthony Williams, appellant, in cause No. 61595;

State of Missouri, respondent, and Tommy Bryant Kendrick, appellant, in cause No. 61936;

State of Missouri, respondent, and Johnny Williams, appellant, in cause No. 62185;

State of Missouri, respondent, and Wallace D. Counselman, Jr., appellant, in cause No. 63137;

State of Missouri, respondent, and Bobby Joe McGee, appellant, in cause No. 63136;

State of Missouri, respondent, and Michael L. White, appellant, in cause No. 62243;

State of Missouri, respondent, and Marlon Payne, appellant, in cause No. 63135;

State of Missouri, respondent, and Donald Greer, appellant, in cause No. 61548;

William Brown, appellant, and State of Missouri, respondent, in cause No. 63147;

State of Missouri, respondent, and Jackie Martin, appellant, in cause No. 63151;

State of Missouri, respondent, and Eddie Greer, appellant, in cause No. 63150;

State of Missouri, respondent, and Harold Hawkins, appellant, in cause No. 63149;

State of Missouri, respondent, and Carl Fletcher, appellant, in cause No. 62049;

State of Missouri, respondent, and Hansford Gaskin, appellant, in cause No. 61433;

State of Missouri, respondent, and Edward H. Pennington, Jr., appellant, in cause No. 61928.

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No. _____

IN THE

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OCTOBER TERM, 1981

STATE OF MISSOURI,
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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

PETITION FOR CERTIORARI

Petitioner, State of Missouri, respectfully requests that writs of certiorari issue to review the judgments of the Supreme Court of Missouri in these twenty-three cases joined as per Supreme Court Rule 19.4.

OPINIONS BELOW

The most recent opinions of the Missouri Supreme Court in the twenty-three cases for which writs of certiorari are being sought are re-printed in Appendix A. None of them have yet been published. In order of their appearance in the appendix, the causes are as follows:

State of Missouri v. Robert Lee Haggard, Supreme Court No. 62227, opinion filed July 14, 1981;

State of Missouri v. Donnie L. Collins, Supreme Court No. 61348, opinion filed July 14, 1981;

State of Missouri v. Stanley G. Helton, Supreme Court No. 63230, opinion filed July 14, 1981;

State of Missouri v. Randy Lee Sinclair, Supreme Court No. 63231, opinion filed July 14, 1981;

State of Missouri v. Timothy Crews, Supreme Court No. 63227, opinion filed July 14, 1981;

State of Missouri v. Willie Tunstall, Supreme Court No. 63229, opinion filed July 14, 1981;

State of Missouri v. Terry Gene Crews, Supreme Court No. 63228, opinion filed July 14, 1981;

State of Missouri v. Robert Lowery, Supreme Court No. 62710, opinion filed July 14, 1981;

State of Missouri v. Rollan Anthony Williams, Supreme Court No. 61595, opinion filed July 14, 1981;

State of Missouri v. Tommy Bryant Kendrick, Supreme Court No. 61936, opinion filed July 14, 1981;

State of Missouri v. Johnny Williams, Supreme Court No. 62185, opinion filed July 14, 1981;

State of Missouri v. Wallace D. Counselman, Jr., Supreme Court No. 63137, opinion filed July 14, 1981;

State of Missouri v. Bobby Joe McGee, Supreme Court No. 63136, opinion filed July 14, 1981;

State of Missouri v. Michael L. White, Supreme Court No. 62243, opinion filed July 14, 1981;

State of Missouri v. Marlon Payne, Supreme Court No. 63135, opinion filed July 14, 1981;

State of Missouri v. Donald Greer, Supreme Court No. 61548, opinion filed July 14, 1981;

William Brown v. State of Missouri, Supreme Court No. 63147, opinion filed July 14, 1981;

State of Missouri v. Jackie Martin, Supreme Court No. 63151, opinion filed July 14, 1981;

State of Missouri v. Eddie Greer, Supreme Court No. 63150, opinion filed July 14, 1981;

State of Missouri v. Harold Hawkins, Supreme Court No. 63149, opinion filed July 14, 1981;

State of Missouri v. Carl Fletcher, Supreme Court No. 62049, opinion filed July 14, 1981;

State of Missouri v. Hansford Gaskin, Supreme Court No. 61433, opinion filed July 14, 1981;

State of Missouri v. Edward H. Pennington, Jr., Supreme Court No. 61928, opinion filed July 14, 1981.

In addition, Appendix C contains Missouri Court of Appeals opinions rendered in many of the cases joined herein. It should be noted that the Missouri Court of Appeals did not render an opinion in certain cases joined in this petition. Those cases in which an opinion was rendered by the Missouri Court of Appeals are listed in Appendix C as follows:

State of Missouri v. Johnny Williams, 610 S.W.2d 644 (Mo.App., E.D. 1980);

State of Missouri v. Marlon Payne, 607 S.W.2d 822 (Mo.App., E.D. 1980);

State of Missouri v. Stanley G. Helton, 607 S.W.2d 772 (Mo.App., E.D. 1980);

State of Missouri v. Robert Lowery, 608 S.W.2d 445 (Mo.App., E.D. 1980);

State of Missouri v. Michael L. White, 610 S.W.2d 646 (Mo.App., E.D. 1980);

State of Missouri v. Wallace D. Counselman, Jr., 603 S.W.2d 3 (Mo.App., E.D. 1980);

State of Missouri v. Bobby Joe McGee, 602 S.W.2d 709 (Mo.App., E.D. 1980);

State of Missouri v. Harold Hawkins, 608 S.W.2d 496 (Mo.App., W.D. 2980);

State of Missouri v. Eddie Greer, 609 S.W.2d 423 (Mo. App., W.D. 1980);

State of Missouri v. Randy Lee Sinclair, 606 S.W.2d 271 (Mo.App., S.D. 1980);

State of Missouri v. Willie Tunstall, 607 S.W.2d 809 (Mo.App., E.D. 1980);

State of Missouri v. Timothy Crews, 607 S.W.2d 759 (Mo.App., E.D. 1980);

State of Missouri v. Terry Crews, 607 S.W.2d 729 (Mo. App., E.D. 1908);

State of Missouri v. Donnie L. Collins, 607 S.W.2d 781 (Mo.App., W.D. 1980);

William Brown v. State of Missouri, 607 S.W.2d 801 (Mo.App., W.D. 1980); and

State of Missouri v. Jackie Martin, 610 S.W.2d 18 (Mo. App., W.D. 1980).

In addition, one of the two divisions of the Missouri Supreme Court rendered an earlier opinion in four of the cases joined herein. Those cases are listed in Appendix C immediately following the Missouri Court of Appeals opinions in the following order:

State of Missouri v. Rollan Anthony Williams, 606 S.W.2d 777 (Mo. 1980);

State of Missouri v. Tommy Bryant Kendrick, 606 S.W.2d 643 (Mo. 1980);

State of Missouri v. Donald Greer, 605 S.W.2d 93 (Mo. 1980).

A division of the Missouri Supreme Court also rendered an earlier opinion in *State* v. *Haggard*, No. 62227. This opinion was reprinted in the Missouri Supreme Court's en banc opinion of July 14, 1981, and consequently, may be found in the *Haggard* opinion included in Appendix A.

JURISDICTIONAL STATEMENT

In *State of Missouri* v. *Robert Lee Haggard*, No. 62227, the opinion of the Supreme Court of Missouri was filed July 14, 1981. The opinion affirmed a conviction for robbery, first degree, and reversed a conviction for armed criminal action. On July 29, 1981, the Supreme Court overruled the State's motion for rehearing. The order overruling the motion is included in Appendix A directly after the opinion in this cause.

In *State of Missouri* v. *Donnie L. Collins*, No. 63148, the opinion of the Missouri Supreme Court was filed on July 14, 1981. The opinion affirmed a conviction for robbery, first degree, and reversed a conviction for armed criminal action. On July 29, 1981, the Supreme Court overruled the State's motion for rehearing. The order over-

ruling the motion is included in Appendix A directly after the opinion in this cause.

In *State of Missouri* v. *Stanley G. Helton*, No. 63230, the opinion of the Supreme Court of Missouri was filed July 14, 1981. The opinion affirmed a conviction for robbery, first degree, and reversed a conviction for armed criminal action. On July 29, 1981, the Supreme Court overruled the State's motion for rehearing. The order overruling the motion is included in Appendix A directly after the opinion in this cause.

In *State of Missouri* v. *Randy Lee Sinclair*, No. 63231, the opinion of the Missouri Supreme Court was filed July 14, 1981. The opinion affirmed a conviction for assault, second degree, and reversed a conviction for armed criminal action. On July 29, 1981, the Supreme Court overruled the State's motion for rehearing. The order overruling the motion is included in Appendix A directly after the opinion in this cause.

In *State of Missouri* v. *Timothy Crews*, No. 63227, the opinion of the Supreme Court of Missouri was filed July 14, 1981. The opinion affirmed convictions of robbery and kidnapping, and reversed a conviction for armed criminal action. On July 29, 1981, the Supreme Court overruled the State's motion for rehearing. The order overruling the motion is included in Appendix A directly after the opinion in this cause.

In *State of Missouri* v. *Willie Tunstall*, No. 63229, the opinion of the Supreme Court of Missouri was filed July 14, 1981. The opinion affirmed a conviction for attempted robbery, first degree, and reversed a conviction for armed criminal action. On July 29, 1981, the Supreme Court overruled the State's motion for rehearing. The order overruling the motion is included in Appendix A directly after the opinion in this cause.

In *State of Missouri* v. *Terry Gene Crews*, No. 63228, the opinion of the Supreme Court of Missouri was filed July 14, 1981. The opinion affirmed a conviction for robbery, first degree, and kidnapping, and reversed a conviction for armed criminal action. On July 29, 1981, the Supreme Court overruled the State's motion for rehearing. The order overruling the motion is included in Appendix A directly after the opinion in this cause.

In *State of Missouri* v. *Robert Lowery*, No. 62710, the opinion of the Supreme Court of Missouri was filed July 14, 1981. The opinion affirmed a conviction for robbery, first degree, and reversed a conviction for armed criminal action. On July 29, 1981, the Supreme Court overruled the State's motion for rehearing. The order overruling the motion is included in Appendix A directly after the opinion in this cause.

In *State of Missouri* v. *Rollan Anthony Williams*, No. 61595, the opinion of the Supreme Court of Missouri was filed July 14, 1981. The opinion affirmed two counts of robbery, first degree, and reversed two counts of armed criminal action. On July 29, 1981, the Supreme Court overruled the State's motion for rehearing. The order overruling the motion is included in Appendix A directly after the opinion in this cause.

In *State of Missouri* v. *Tommy Bryant Kendrick*, No. 61936, the opinion of the Supreme Court of Missouri was filed July 14, 1981. The opinion affirmed a conviction for robbery, first degree, and reversed four counts of armed criminal action. On July 29, 1981, the Supreme Court overruled the State's motion for rehearing. The order overruling the motion is included in Appendix A directly after the opinion in this cause.

In *State of Missouri* v. *Johnny Williams*, No. 62185, the opinion of the Supreme Court of Missouri was filed

July 14, 1981. The opinion affirmed convictions for assault, and reversed a conviction for armed criminal action. On July 29, 1981, the Supreme Court overruled the State's motion for rehearing. The order overruling the motion is included in Appendix A directly after the opinion in this cause.

In *State of Missouri* v. *Wallace D. Counselman, Jr.*, No. 63137, the opinion of the Supreme Court of Missouri was filed July 14, 1981. The opinion affirmed a conviction of robbery, first degree, and reversed a conviction for armed criminal action. On July 29, 1981, the Supreme Court overruled the State's motion for rehearing. The order overruling the motion is included in Appendix A directly after the opinion in this cause.

In *State of Missouri* v. *Bobby Joe McGee*, No. 63136, the opinion of the Supreme Court of Missouri was filed July 14, 1981. The opinion reversed a conviction for assault with intent to do great bodily harm without malice and a conviction for armed criminal action. On July 29, 1981, the Supreme Court overruled the State's motion for rehearing. The order overruling the motion is included in Appendix A directly after the opinion in this cause.

In *State of Missouri* v. *Michael L. White*, No. 62243, the opinion of the Missouri Supreme Court was filed July 14, 1981. The opinion affirmed a conviction for robbery, first degree, and reversed a conviction for armed criminal action. On July 29, 1981, the Supreme Court overruled the State's motion for rehearing. The order overruling the motion is included in Appendix A directly after the opinion in this cause.

In *State of Missouri* v. *Marlon Payne*, No. 63135, the opinion of the Supreme Court of Missouri was filed July 14, 1981. The opinion affirmed a conviction of robbery, first degree, and reversed a conviction for armed criminal ac-

tion. On July 29, 1981, the Supreme Court overruled the State's motion for rehearing. The order overruling the motion is included in Appendix A directly after the opinion in this cause.

In *State of Missouri* v. *Donald Greer*, No. 61548, the opinion of the Supreme Court of Missouri was filed July 14, 1981. The opinion affirmed a conviction for murder, second degree, and reversed a conviction for armed criminal action. On July 29, 1981, the Supreme Court overruled the State's motion for rehearing. The order overruling the motion is included in Appendix A directly after the opinion in this cause.

In *William Brown* v. *State of Missouri*, No. 63147, the opinion of the Missouri Supreme Court was filed July 14, 1981. The opinion directed the trial court to enter a judgment vacating its judgment and conviction for armed criminal action. On July 29, 1981, the Supreme Court overruled the State's motion for rehearing. The order overruling the motion is included in Appendix A directly after the opinion in this cause.

In *State of Missouri* v. *Jackie Martin*, No. 63151, the opinion of the Supreme Court of Missouri was filed July 14, 1981. The opinion affirmed a conviction for robbery, first degree, and reversed a conviction for armed criminal action. On July 29, 1981, the Supreme Court overruled the State's motion for rehearing. The order overruling the motion is included in Appendix A directly after the opinion in this cause.

In *State of Missouri* v. *Eddie Greer*, No. 63150, the opinion of the Supreme Court of Missouri was filed July 14, 1981. The opinion affirmed convictions for kidnapping, rape, and sodomy and reversed convictions for armed criminal action. On July 29, 1981, the Supreme Court overruled the State's motion for rehearing. The order overruling

the motion is included in Appendix A directly after the opinion in this cause.

In *State of Missouri* v. *Harold Hawkins*, No. 63149, the opinion of the Supreme Court of Missouri was filed July 14, 1981. The opinion affirmed a conviction for robbery, first degree, and reversed a conviction for armed criminal action. On July 29, 1981, the Supreme Court overruled the State's motion for rehearing. The order overruling the motion is included in Appendix A directly after the opinion in this cause.

In *State of Missouri* v. *Carl Fletcher*, No. 62049, the opinion of the Supreme Court of Missouri was filed July 14, 1981. The opinion affirmed convictions of rape, robbery, and kidnapping, and reversed a conviction for armed criminal action. On July 29, 1981, the Supreme Court overruled the State's motion for rehearing. The order overruling the motion is included in Appendix A directly after the opinion in this cause.

In *State of Missouri* v. *Hansford Gaskin*, No. 61433, the opinion of the Supreme Court of Missouri was filed July 14, 1981. The opinion affirmed convictions for robbery and assault, and reversed a conviction for armed criminal action. On July 29, 1981, the Supreme Court overruled the State's motion for rehearing. The order overruling the motion is included in Appendix A directly after the opinion in this cause.

In *State of Missouri* v. *Edward H. Pennington, Jr.*, No. 61928, the opinion of the Supreme Court of Missouri was filed July 14, 1981. The opinion affirmed a conviction for robbery first degree, and reversed a conviction for armed criminal action. On July 29, 1981, the Supreme Court overruled the State's motion for rehearing. The order overruling the motion is included in Appendix A directly after the opinion in this cause.

The present petition is filed within sixty days after the entry of final judgment in all of these cases, and this Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment, reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sections 560.120, RSMo 1969; 560.135, RSMo Supp. 1975; 565.004, 565.060, 571.015, RSMo 1978; 559.180, 559.190, RSMo 1969; 559.240, RSMo 1969; and 559.225, RSMo Supp. 1976, are set forth in Appendix B.

STATEMENT OF THE CASE

This joint petition is brought as a result of the continuing controversy over the application of the Double Jeopardy Clause, contained in the Fifth Amendment to the United States Constitution, to the prosecution of criminal defendants in Missouri under the Armed Criminal Action Statute § 559.225, RSMo Supp. 1976, and in the same trial, for the felony underlying the armed criminal action charge. In each of the cases joined in this petition, the Supreme Court of Missouri has issued an opinion relying on the authority

of *Sours* v. *State*, 593 S.W.2d 208 (Mo. banc 1980); *vacated* and *remanded*, 445 U.S. ____ (1980); *decided upon a rehearing*, 603 S.W.2d 592 (Mo. banc August 18, 1980). The opinion rendered by the Missouri Supreme Court in *Sours*, *supra*, was reaffirmed by the court in *State* v. *Haggard*, No. 62227 (Mo. banc July 14, 1981). The *Haggard* opinion is one of the twenty-three cases joined in this petition. In the remaining twenty-two opinions included in this petition, both *Haggard*, *supra*, and *Sours*, *supra*, were cited by the Missouri Supreme Court as authority.

The facts in each of the twenty-three cases joined herein, for purposes of the Double Jeopardy Clause, are substantially the same in that each of the respondents were prosecuted under the Armed Criminal Action Statute, § 559.225, RSMo Supp. 1976, and also prosecuted for the underlying felony. In petitioner's jurisdictional statement filed herein, the underlying felonies in each case are enumerated. In addition, Appendix B, filed herein, sets forth the various underlying felony statutes prosecuted in the twenty-three cases joined herein. Finally, Appendix B sets forth the text of Missouri's Armed Criminal Action Statute, § 559.225, RSMo Supp. 1976 (now § 571.015, RSMo 1978).

With the exception of *State* v. *Haggard*, No. 62227; *State* v. *Fletcher*, No. 62049; *State* v. *Gaskin*, No. 61433; and *State* v. *Pennington*, No. 61928; all cases joined in this petition have been previously presented to this Court via petitions for writ of certiorari. See *Missouri* v. *Counselman*, No. 80-754; *Missouri* v. *Greer*, No. 80-997; *Missouri* v. *Sinclair*, No. 80-1166; *Missouri* v. *Brown*, No. 80-1368; *Missouri* v. *Crews*, No. 80-1393; and *Missouri* v. *Lowery*, No. 80-1561. Furthermore, petitioner currently has a petition for a writ of certiorari pending in this Court in the case of *Wyrick* v. *Williams*, No. 80-2200. The Orders issued by this Court in *Counselman*, *Greer*, *Sinclair*, *Brown*, *Crews*, and *Lowery* are substantially similar in that each granted the state's

petition for a writ of certiorari; each vacated the lower court's judgment and remanded its respective cases to the lower court for further consideration in light of *Albernaz* v. *United States*, 450 U.S. ____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981).

In order to better understand the history of the armed criminal action controversy, the following perspective is offered:

The armed criminal action odyssey began on January 18, 1980, when the Missouri Supreme Court, in an opinion styled: *Sours* v. *State*, 593 S.W.2d 208 (Mo. banc 1980), held that it constituted a violation of the Double Jeopardy Clause contained in the Fifth Amendment to the United States Constitution for the defendant to be convicted, in a single proceeding, of both armed criminal action, and its predicate felony, robbery, first degree. This opinion became known as: *Sours I*. Thereafter, the State petitioned the United States Supreme Court for a writ of certiorari. On May 27, 1980, this Court vacated *Sours I* and remanded the case for further consideration in light of *Whalen* v. *United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). *Missouri* v. *Sours*, 446 U.S. 962, 100 S.Ct. 2935, 64 L.Ed.2d 820 (1980). The issue was then rebriefed and resubmitted to the Missouri Supreme Court. On August 18, 1980, the Missouri Supreme Court reconsidered *Sours I* in light of *Whalen, supra*, in an opinion styled: *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc 1980). This opinion became known as *Sours II*. In *Sours II*, the Missouri Supreme Court incorporated by reference *Sours I* and, although it held that the legislature unquestionably intended that punishment for both armed criminal action and its predicate felony be imposed, the court, again, concluded that imposition of such punishments constituted double jeopardy in violation of the Fifth Amendment to the United States Constitution. The Missouri Supreme

Court in *Sours II* addressed this Court's order of May 27, 1980, by distinguishing *Whalen, supra.*

Thereafter, the State of Missouri filed a petition for a writ of certiorari in this Court requesting review of *Sours II.* On January 26, 1981, this Court, in *Missouri* v. *Sours,* ____ U.S. ____, 101 S.Ct. 953, 67 L.Ed.2d 118 (1981), denied the State's application for certiorari. In respondent's response to the State's petition for a writ of certiorari in *Sours II,* respondent filed documents in support of his contention that the double jeopardy issue was moot. Based on respondent's documentation, he had been released from the penitentiary in November, 1980. Respondent's armed criminal action sentence had been previously vacated and, because it was only a three year sentence, would have ended in August, 1980. Respondent's robbery, first degree, sentence was commuted in November, 1980. In this Court's January 6, 1981, order denying the State's petition for a writ of certiorari, it was indicated that Justices Blackmun and Rehnquist "would dismiss the petition for a writ of certiorari as moot." *Id.* 101 S.Ct. at 953.

Subsequent to the Missouri Supreme Court's opinion in *Sours II,* that court, as well as the various districts of the Missouri Court of Appeals (Missouri's intermediate appellate court), reversed numerous convictions for armed criminal action. The State, in a series of petitions for writs of certiorari, requested review of these cases from the United States Supreme Court. See, *Missouri* v. *Counselman,* No. 80-754; *Missouri* v. *Greer,* No. 80-997; *Missouri* v. *Sinclair,* No. 80-1166; *Missouri* v. *Brown,* No. 80-1368; *Missouri* v. *Crews,* No. 80-1393; and *Missouri* v. *Lowery,* No. 80-1561.

Subsequent to this Court's January 26, 1981 denial of the State's petition for a writ of certiorari in *Missouri* v. *Sours, supra,* several orders of this Court issued directing

various Missouri appellate courts to reconsider the double jeopardy issue in light of *Albernaz* v. *United States*, 450 U.S. ____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). On March 23, 1981, *Counselman* was remanded to the Missouri Court of Appeals, Eastern District.* On March 30, 1981, this Court remanded *Brown* to the Missouri Court of Appeals, Western District, for further consideration in light of *Albernaz*. On May 26, 1981, this Court remanded *Greer* to the Supreme Court of Missouri for further consideration in light of *Albernaz*. On June 8, 1981, this Court remanded *Sinclair* to the Missouri Court of Appeals, Southern District, and *Lowery* to the Missouri Court of Appeals, Eastern District, both for further consideration in light of *Albernaz*. Finally, on June 22, 1981, this Court remanded *Crews* to the Missouri Court of Appeals, Eastern District, for further consideration in light of *Albernaz*.

These six orders of this Court remanded a total of nineteen cases to the Missouri appellate courts. Those cases in which the writ of certiorari was directed to the Missouri Court of Appeals ultimately were transferred to the Missouri Supreme Court. Consequently, all nineteen cases were added to the docket of the Missouri Supreme Court.

In May, 1980, the Missouri Supreme Court granted a Motion for Rehearing in *State* v. *Haggard*, No. 62227 (October 15, 1980). Rehearing was ordered so that the court could use the *Haggard* case as the vehicle for accomplishing

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*On this same date, this Court remanded two cases to the Delaware Supreme Court under virtually identical circumstances. *Delaware* v. *Hunter*, ____ U.S. ____, No. 80-283 (March 23, 1981); *Delaware* v. *Evans*, No. 80-749 (March 23, 1981). Also, on that same date, this Court dismissed an appeal for want of jurisdiction and, in the alternative, denied certiorari in a Maryland case where the state court had held that multiple convictions and sentences for both armed robbery and a felony firearm's offense had not constituted double jeopardy. *Whack* v. *Maryland*, ____ U.S. ____, No. 80-5492 (March 23, 1981).

the reexamination of the armed criminal action/double jeopardy issue in light of *Albernaz,* as per this Court's orders. In addition, the Missouri Supreme Court invited the parties, public defenders, and prosecutors involved in the nineteen cases remanded by this Court to participate in briefing and arguing the issue on May 27, 1981.

Thereafter, on July 14, 1981, the Missouri Supreme Court rendered its most recent decision on the double jeopardy issue in *State* v. *Haggard,* No. 62227 (Mo. banc July 14, 1981). On that same date, the Court issued per curiam opinions in the nineteen cases remanded by this Court, incorporating by reference its opinion rendered in *Haggard.* In addition, the Missouri Supreme Court rendered separate opinions in three additional cases (also joined in this petition) addressing the armed criminal action issue. In these three cases, the court, again, incorporated by reference its opinion rendered in *Haggard.*

In *Haggard, supra,* the Missouri Supreme Court held:

> Under these circumstances we are again compelled to affirm our prior position, as expressed in Sours II, and hold that by enactment of these two statutes the Missouri legislature intended to twice punish the appellant, and that such multiple punishments for the same offense arising out of the same transaction violates the Fifth Amendment to the United States Constitution. Until such time as the Supreme Court of the United States declares clearly and unequivocally that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution does not apply to the legislative branch of government, we cannot do other than what we perceive to be our duty to refuse to enforce multiple punishments for the same offense arising out of a single transaction.

State v. *Haggard,* No. 62227 (Mo. banc July 14, 1981) (slip

op. 6). It is from this most recent decision of the Missouri Supreme Court (and from the 22 decisions of that court incorporating *Haggard*) that petitioner seeks this Court's review.

THE REASONS FOR GRANTING THE WRIT

Petitioner submits that a writ of certiorari should issue because the Missouri Supreme Court's holding in *State* v. *Haggard*, No. 62227 (Mo. banc July 14, 1981) (incorporated by reference in the remaining 22 cases joined in this petition), conflicts with recent decisions of this Court.[1]

During the May 27, 1981 oral argument before the Missouri Supreme Court in connection with the instant cases, petitioner argued that, any questions in regard to Double Jeopardy not answered in *Brintley* v. *Michigan*, 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979); *Whalen* v. *United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980); and *United States* v. *DiFrancesco*, ____ U.S. ____, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980), were definitively answered by this Court's decision in *Albernaz* v. *United States*, 450 U.S. ____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). Specifically, petitioner argued that because the Missouri Supreme Court had stated in unequivocal terms that the Missouri legislature clearly intended that punishment be imposed for both armed criminal action and its predicate felony, *Albernaz* disposed of the double jeopardy issue in holding that:

> [T]he question of what punishments are constitutionally permissible is not different from the question of what punishment the legislative branch intended to

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[1]The Missouri Supreme Court's most recent holding in *Haggard* is virtually identical to its holdings made previously in *Sours* v. *State*, 593 S.W.2d 208 (Mo. banc 1980) (*Sours I*) and *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc 1980) (*Sours II*).

> be imposed. Where Congress intended, as it did here, to impose multiple punishment, imposition of such sentences does not violate the constitution. [footnote omitted].

Albernaz v. *United States, supra,* 101 S.Ct. at 1145.

However, the Missouri Supreme Court remained unconvinced, or, as that court intimated, confused. The court opined as follows:

> Having traversed the almost identical stormy course as that of our brothers in Delaware, we too perceive ourselves as sailing toward the 'Sargasso Sea' mentioned in *Albernaz* and described in *Hunter* v. *Delaware,* ____ A2d ____ (Del. 1981), decided May 12, 1981. [footnote omitted].

Haggard v. *State,* No. 62227 (Mo. banc July 14, 1981) (Slip op. 3).

Instead of applying what petitioner argued was the plain meaning of this Court's decision in *Albernaz,* the Missouri Supreme Court chose to distinguish *Albernaz.*

> Our reading of *Albernaz* persuades us that the United States Supreme Court was dealing with two separate crimes each involving proof of an element different from and not included in the other. Our case and its predecessors, *Sours I* and *Sours II,* are distinguishable from *Albernaz* for the reason that having proved every fact and element necessary to prove robbery with a dangerous and deadly weapon, you have proved every element and every fact required for proof of armed criminal action. We are in complete agreement with the *Hunter* court that 'the definitive ultimate and penultimate sentences of *Albernaz* are *dicta,* unnecessary to reach the court's conclusion in that case; . . . .' ____ A2d at ____ (emphasis in original).

Haggard, supra, slip op., 3. Even more incredible than the Missouri Supreme Court's attempt to distinguish *Albernaz,* was its attempt to shore up its position by using an order, issued by this Court, denying a writ of certiorari.

> On January 26, 1981, the United States Supreme Court entered its order denying the petition of the State for certiorari in *Sours II* [603 S.W.2d 592 (Mo. banc 1980)]. Following the same reasoning expressed by the *Hunter* court, a large majority of the United States Supreme Court *tacitly, if not in fact, sustained our position as stated in Sours II.*

Haggard, supra, slip op., 5. It is by no means coincidental that Judge Rendlen of the Missouri Supreme Court, in his dissenting opinion, reminded the court of the well-established rule that inferences should not be drawn from the denial of a writ of certiorari. *Id.,* Dissenting opinion of Rendlen, J., slip op., 9. See *United States* v. *Kras,* 409 U.S. 434, 443, 93 S.Ct. 631, 34 L.Ed.2d 626 (1973); *Hughes Tool Company* v. *Trans World Airlines, Inc.,* 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973).

It is interesting to note that, although the Missouri Supreme Court, in *Haggard,* drew an adverse inference from this Court's denial of the State's petition for a writ of certiorari in *Missouri* v. *Sours,* ____ U.S. ____, 101 S.Ct. 953, 67 L.Ed.2d 118 (1981) (*Sours II*), it never attempted to explain why this Court subsequently vacated and remanded nineteen cases in *Missouri* v. *Counselman,* No. 80-754; *Missouri* v. *Greer,* No. 80-997; *Missouri* v. *Brown,* No. 80-1368; *Missouri* v. *Crews,* No. 80-1393; *Missouri* v. *Sinclair,* No. 80-1166; and *Missouri* v. *Lowery,* No. 80-1561. Instead, the Missouri Supreme Court leapt to the following conclusion:

> Under these circumstances we are again compelled to affirm our prior position, as expressed in *Sours II,*

> and hold that by enactment of these two statutes the Missouri Legislature intended to twice punish the appellant, and that such multiple punishments for the same offense arising out of the same transaction violates the Fifth Amendment to the United States Constitution. *Until such time as the Supreme Court of the United States declares clearly and unequivocally that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution does not apply to the legislative branch of government, we cannot do other than what we perceive to be our duty to refuse to enforce multiple punishments for the same offense arising out of a single transaction.* [Emphasis added].

Haggard, supra, slip op., 6. Petitioner believes that "such time" is now.

In *Delaware,* "such time" came on May 12, 1981. On that date the Supreme Court of Delaware, under a mandate of this Court almost identical to the mandate under which the Missouri Supreme Court found itself in *Haggard,* in a case involving imposition of multiple sentences for (1) first degree assault, 11 Del. C. § 613 (1), and (2) possession of a deadly weapon during the commission of a felony, 11 Del. C. § 1447, opined as follows:

> [T]he emergence of the evolving rule stands unmistakably clear by virtue of the vote of 6 to 3, cast in the face of the flat contradiction of the concurring justices, including the author of *Whalen.*
>
> Applying the rule of *Albernaz* to the instant case, we now hold that where the General Assembly intended, as we have found that it did in § 613(1) and § 1447, to impose multiple punishments for two offenses not satisfied in the *Blockburger* test, imposition of two consecutive sentences by a court as a result of a single criminal trial does not violate the Double Jeopardy Clause of the Fifth Amendment. [footnote omitted].

Hunter v. *Delaware*, 438 A.2d 476, 481 (Del. Supr. 1981). So, the same must come to pass in the Missouri Supreme Court.

The same has already been accepted by the United States District Court for the Eastern District of Missouri. On July 29, 1981, United States District Judge for the Eastern District of Missouri, John F. Nangle, issued an order accepting the Review and Recommendation of a United States Magistrate in *Bullock* v. *Wyrick*, No. 80-400 C (2) (the order of the judge and the recommendation of the magistrate are reprinted in Appendix D). The review and recommendation of the magistrate illustrates the conflict of views which currently exists between the Missouri Supreme Court and the Federal courts in Missouri in regard to the instant issue. The magistrate addressed the issue as follows:

> *Bullock* contends his conviction for armed criminal action was a violation of the rights secured by the Double Jeopardy Clause. This Court notes that armed criminal action and any other underlying felony may be the 'same' offense under *Blockburger* v. *United States, supra.* The standards enunciated by *Blockburger* are inapplicable to the offense of armed criminal action because the Missouri State Legislature has evinced the clear intent that punishment under the armed criminal action statute be in addition to punishment for the underlying felony. See, *Sours* v. *State, supra*, wherein the Missouri Supreme Court definitively interpreted the Missouri Legislature's intent. The United States Supreme Court has recently held the Federal Double Jeopardy Clause does not bar multiple conviction and punishment where the legislature intends multiple and separate punishment. *Albernaz* v. *United States*, 101 S.Ct. 1137 (1981); *Whalen* v. *United States*, 445 U.S. 684 (1980); *Missouri* v. *Coun-*

> *selman*, 101 S.Ct. 1690 (1981); *Missouri* v. *Brown*, 101 S.Ct. 1735 (1981). This line of cases indicates if the Legislature intends crimes to be punished multiply and separately, then no Double Jeopardy violation exists. Only if the legislative intent is uncertain is the *Blockburger* test applied. Since the Missouri Legislature intended punishment for armed criminal action to be in addition to punishment for the underlying felony, no double jeopardy problem exists.

Magistrate's Review and Recommendation in *Bullock* v. *Wyrick, supra* (reprinted in Appendix D).

Further indication of the divergence of views between the Missouri Supreme Court and the Federal District Court is illustrated by an order issued by another United States District Judge for the Eastern District of Missouri. In *Woods* v. *Wyrick*, No. 79-498 C (1) (reprinted in petitioner's Appendix D), a state inmate alleged that his armed criminal action conviction violated the Double Jeopardy Clause. However, the federal district judge denied federal habeas corpus relief on the grounds that *Albernaz* permits such multiple punishments where the legislative intent to so punish is manifest. However, in a supplemental order issued subsequent to the Missouri Supreme Court's decision in *Haggard, supra*, and presumably to retain a harmonious relationship with the Missouri Supreme Court, the judge in *Woods* stayed the inmates motion for reconsideration:

> Because the United States Supreme Court is the final arbiter of United States Constitutional guarantees, and after notification by affidavit of the Missouri Attorney General's intention to seek a writ of certiorari from the United States Supreme Court,
>
> IT IS HEREBY ORDERED that petitioner's motion for reconsideration be and is STAYED until final disposition of *State of Missouri* v. *Robert Lee Haggard*.

Order of H. Kenneth Wangelin, United States District Judge for the Eastern District of Missouri, in *Woods* v. *Wyrick, supra,* (reprinted in respondent's Appendix D).

It would appear that the "frustration" experienced by both the Missouri and Delaware Supreme Courts was created by each court's mistaken belief as to the application of what has become known as the *Blockburger* test. See *Blockburger* v. *United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). However, *Albernaz* clarified that which *Whalen* left unanswered in regard to the application of the *Blockburger* test. In *Albernaz,* the defendants were convicted, in a single proceeding, of conspiracy to import marijuana and conspiracy to distribute marijuana and received consecutive sentences on each count. Both convictions stemmed from a single agreement, the objectives of which were to import marijuana and then to distribute it domestically. The defendants argued that Congress had not intended multiple punishments to be imposed in a situation such as theirs and that, even if it had such intent, the Double Jeopardy Clause of the Fifth Amendment prohibited the imposition of such punishment.

In rejecting *both* arguments, this Court emphasized, just as it previously had done in *Whalen* v. *United States, supra,* 100 S.Ct. at 1438, that the *Blockburger* test, which was treated as a matter of substantive constitutional law in *Sours I and II* was actually nothing more than "a rule of statutory construction," which, "because it serves as a means of discerning congressional purpose should not be controlling where, for example, there is a clear indication of contrary legislative intent." *Albernaz* v. *United States, supra,* 101 S.Ct. at 1143.

Petitioner believes that certiorari should be granted in this cause because both the Missouri Supreme Court and the Missouri Court of Appeals continue to reverse

armed criminal action convictions and release, back into society, felons who have been constitutionally convicted. In *Haggard,* the Missouri Supreme Court has expanded the application of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution to situations in which this Court has specifically refrained from so expanding. Since the very beginning, petitioner has argued in the Missouri Supreme Court that a state may not impose such greater restrictions as a matter of federal constitutional law when the United States Supreme Court has specifically refrained from imposing them. *Oregon* v. *Hass,* 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975).

The time has come for this Court to invoke, with full force, the "rule of supremacy" and alleviate the Missouri Supreme Court's "frustration" a state of mind which has developed over the past two years into a recalcitrance which that court has indicated can only be changed by a decision of this Court which addresses the double jeopardy issue as it pertains to the Missouri armed criminal action statute.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

APPENDIX A

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. ROBERT LEE HAGGARD, *Appellant.*	**No. 62227**

On Motion For Rehearing

Motion for rehearing was granted solely upon the issue of whether or not conviction for armed criminal action, § 559.225, RSMo Supp. 1976, and robbery in the first degree with a dangerous and deadly weapon, §§ 560.120, RSMo 1969, and 560.135, RSMo Supp. 1975, arising out of the same transaction, violated the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution based upon reexamination of the case in light of Albernaz v. United States, 450 U.S. ____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981).

On January 15, 1980, this Court in Sours v. State, 593 S.W.2d 208 (Mo. banc 1980) (hereafter *Sours I*) held that conviction under both of these statutes for acts arising out of the same transaction constituted double jeopardy under the United States Constitution. Double jeopardy under our own Constitution, Article I, Section 19, is limited to prosecution or conviction only after having been "once acquitted."

On May 27, 1980, the United States Supreme Court vacated *Sours I* and remanded the case for consideration in light of Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). Missouri v. Sours, 446 U.S. 962, 100 S.Ct. 2935, 64 L.Ed.2d 820 (1980).

On August 18, 1980, this Court reconsidered *Sours I* in light of *Whalen* and issued its opinion in State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (hereafter *Sours* II), which opinion is attached as Appendix I to this opinion.[1]

On January 26, 1981, in Missouri v. Sours, ____ U.S. ____, 101 S.Ct. 953, 67 L.Ed.2d 118 (1981) *(Sours II)*, the United States Supreme Court denied the application of the State of Missouri for certiorari. The Missouri courts of appeals continued to rule a number of cases based upon the authority of *Sours II*. After March 23, 1981, the United States Supreme Court granted certiorari on several of these courts of appeals cases and remanded them together with three by this Court "for further consideration in light of *Albernaz*. . . ."[2]

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[1]*Sours II* is made an appendix to this opinion in the interest of brevity and for the convenience of the many who are involved in the several cases ruled contemporaneously herewith. The publishers are authorized to incorporate *Sours II* by reference to its earlier citation in their books.

[2]*See* State v. Counselman, 603 S.W.2d 3 (Mo.App. 1980); State v. McGee, 602 S.W.2d 709 (Mo.App. 1980); State v. Payne, 607 S.W.2d 822 (Mo.App. 1980); State v. White, 610 S.W.2d 646 (Mo.App. 1980); State v. (Johnny) Williams, 610 S.W.2d 644 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Counselman, ____ U.S. ____, 101 S.Ct. 1690, 68 L.Ed.2d 190 (March 23, 1981). *See* Brown v. State, 607 S.W.2d 801 (Mo.App. 1980); State v. Collins, 607 S.W.2d 781 (Mo.App. 1980); State v. Hawkins, 608 S.W.2d 496 (Mo.App. 1980); State v. (Eddie) Greer, 609 S.W.2d 423 (Mo.App. 1980); State v. Martin, 610 S.W.2d 13 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Western District, in Missouri v. Brown, ____ U.S. ____, 101 S.Ct. 1735, 68 L.Ed.2d 222 (March 30, 1981). *See* State v. Sin-

(Continued on next page)

In view of the number of cases involved and for the purpose of avoiding the delays which would result in waiting for mandates, transfers of the cases to this Court, and docketing and hearing in this Court, we chose the instant case as the vehicle for accomplishing the reexamination "in light of *Albernaz.*" We granted the motion for rehearing and limited briefs and arguments to "examination in light of *Albernaz.*" The parties, public defenders and prosecutors were invited to participate in briefing and arguing the issue on May 27, 1981.

Reexamination in Light of Albernaz

Having traversed the almost identical stormy course as that of our brothers in Delaware, we too perceive ourselves as sailing toward the "Sargasso Sea"[3] mentioned

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Footnote continued

clair, 606 S.W.2d 271 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Southern District, in Missouri v. Sinclair, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. Lowery, 608 S.W.2d 445 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Lowery, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. (Timothy) Crews, 607 S.W.2d 759 (Mo.App. 1980); State v. (Terry) Crews, 607 S.W.2d 729 (Mo.App. 1980); State v. Helton, 607 S.W.2d 772 (Mo.App. 1980); State v. Tunstall, 607 S.W.2d 809 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District in Missouri v. Crews, ____ U.S. ____, 49 U.S.L.W. 3953 (June 22, 1981). In all of the above cases where an application for transfer to this Court was requested, all such applications were denied.

See State v. (Donald) Greer, 605 S.W.2d 93 (Mo. 1980); State v. Kendrick, 606 S.W.2d 643 (Mo. 1980); and State v. (Rollan Anthony) Williams, 606 S.W.2d 777 (Mo. 1980), all of which were vacated and remanded to this Court in Missouri v. Greer, ____ U.S. ____, 49 U.S.L.W. 3882 (May 26, 1981).

[3]The Sargasso Sea is a large oval-shaped area of the North Atlantic Ocean set apart by the presence of marine plants, or seaweed, which float on its surface—a region of slow ocean currents surrounded by a boundary of rapidly moving currents such as the Gulf Stream and

(Continued on next page)

in *Albernaz* and described in Hunter v. Delaware, ____ A.2d ____, (Del. 1981), decided May 12, 1981.

Our reading of *Albernaz* persuades us that the United States Supreme Court was dealing with two separate crimes each involving proof of an element different from and not included in the other. Our case and its predecessors, *Sours I* and *Sours II*, are distinguishable from *Albernaz* for the reason that having proved every fact and element necessary to prove robbery with a dangerous and deadly weapon, you have proved every element and every fact required for proof of armed criminal action. We are in complete agreement with the *Hunter* court that "The definitive ultimate and penultimate sentences of *Albernaz* are *dicta*, unnecessary to reach the Court's conclusion in that case; . . ." ____ A.2d at ____ (emphasis in original).

We are not without understanding of the frustration of the *Hunter* court when in seeming desperation they concluded:

> The cloud thus remaining over the law of double jeopardy notwithstanding, we must consider ourselves bound by the majority rule now apparently emerging out of the 'Sargasso Sea' and manifesting itself in the last paragraphs of *Albernaz*. Although *dicta*, the emergence of the evolving rule stands unmistakably clear by virtue of the vote of 6 to 3, cast in the face

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Footnote continued

> the North Equitorial Current. 'The early navigators who sailed their small ships to North America saw the Sargasso Sea as patches of gulfweed that seemed to form wide-spreading meadows. Soon there were legends and myths about the region which told of large islands of thickly matted seaweed inhabited by huge monsters of the deep. *** They pictured a blanket of netted seaweed from which no ship could escape, once it became entangled in the weed. ***

Id. at ____ n.2, *quoting*, *World Book* Enclyclopedia, Vol. 17, p. 111 (1976).

of the flat contradiction of the concurring Justices, including the author of *Whalen*.

Applying the rule of *Albernaz* to the instant case, we now hold that where the General Assembly intended, as we have found that it did in § 613(1) and § 1447, to impose multiple punishments for two offenses not satisfying the *Blockburger* test, imposition of two consecutive sentences by a court as a result of a single criminal trial does not violate the Double Jeopardy Clause of the Fifth Amendment.

The *Hunter* majority in this Court reluctantly follows the evolving rule of the majority of the United States Supreme Court in *Albernaz*. The Rule of Supremacy prevails on this issue, however, and trusting, as we must, that the *dicta* in *Albernaz* will soon become the clear and unquestioned rule of law to be followed, we now hold as follows in the instant case: Our conclusion 'that § 1447 creates an offense distinct from the underlying § 613(1) felony of Assault First Degree, and that it was the legislative intent to subject this defendant to multiple penalties for the single criminal act in which she engaged,' 420 A.2d at 124, is determinative upon the issue of double jeopardy. It follows therefrom that the imposition of multiple sentences upon the defendant for the two offenses in this case does not violate the Double Jeopardy Clause of the Fifth Amendment.

Any statement contrary to the above, contained in the previous *Hunter* opinions of this Court, is hereby abandoned.

The judgment below now stands

AFFIRMED.

____ A.2d at ____ (footnote omitted).

In *Sours I,* a case identical to this case, we followed what we perceived to be the teaching of Illinois v. Vitale, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980); Simpson v. United States, 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed.2d 70 (1978); Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977); Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); Jeffers v. United States, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977); Iannelli v. United States, 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975); North Carolina v. Pearce, 395 U.S., 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); and Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), and held that conviction on both the offense of armed criminal action and the offense of robbery with a dangerous and deadly weapon constituted multiple punishment for the same offense arising out of a single transaction and was violative of the double jeopardy clause of the fifth amendment. When *Sours I* was vacated by the United States Supreme Court and we were directed to reexamine the case in light of *Whalen.* We concluded that the unique wording of the Missouri statutes and clear, positive and unequivocal intent of the legislature to authorize multiple punishments did not leave us the same option which the Court had in *Whalen*—that of finding that Congress intended not to twice punish thereby permitting the Court to reserve the constitutional question of double jeopardy. We concluded that we had no alternative other than to meet the double jeopardy issue. We concluded that we should affirm our prior holding that multiple punishment for the same offense was violative of the double jeopardy clause as we believed it to be con-

strued by *Vitale, Simpson, Harris, Brown, Jeffers, Iannelli, Pearce* and *Blockburger*. On January 26, 1981, the United States Supreme Court entered its order denying the petition of the state for certiorari in *Sours II*. Following the same reasoning expressed by the *Hunter*, court, a large majority of the United States Supreme Court tacitly, if not in fact, sustained our position as stated in *Sours II*. Only Justices Blackmun and Rehnquist noted that they "would dismiss the petition for a writ of certiorari as moot." ____ U.S. at ____, 101 S.Ct. at 953, 67 L.Ed.2d at 118.

Under these circumstances we are again compelled to affirm our prior position, as expressed in *Sours II*, and hold that by enactment of these two statutes the Missouri legislature intended to twice punish the appellant, and that such mutiple punishments for the same offense arising out of the same transaction violates the Fifth Amendment to the United States Constitution. Until such time as the Supreme Court of the United States declares clearly and unequivocally that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution does not apply to the legislative branch of government, we cannot do other than what we perceive to be our duty to refuse to enforce multiple punishments for the same offense arising out of a single transaction.

The Division One opinion of Welborn, C., heretofore adopted by the Court en banc as its principal opinion, is upon this rehearing again adopted as the opinion of the Court en banc. Upon reexamination of the case in light of *Albernaz*, we conclude that the judgment of conviction

on Count II for armed criminal action must be reversed as set forth in the principal opinion. The Division One opinion of Welborn, C., adopted by the Court en banc as its principal opinion and filed herein March 9, 1981, is now ordered published together with this opinion on rehearing.

Conviction on Count I, affirmed.

Conviction on Count II, reversed.

WARREN D. WELLIVER, Judge

Donnelly, C.J., Seiler, Morgan, Higgins, and Bardgett, JJ., concur; Rendlen, J., concurs in part and dissents in part in separate opinion filed.

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. ROBERT LEE HAGGARD, *Appellant.*	No. 62227

APPEAL FROM THE CIRCUIT COURT OF COOPER COUNTY
HONORABLE DONALD BARNES, JUDGE

Robert Haggard was convicted of robbery, first degree, §§ 560.120 RSMo 1969, and 560.135, RSMo 1975 Supp., and armed criminal action, § 559.225, RSMo 1976 Supp. The jury assessed punishment at 15 years on the robbery count and 18 years on the armed criminal action count. Judgment and sentence were entered accordingly, the sentences to run concurrently.

Appellant raises seven points of error: (1) refusal of requested continuance; (2) permitting the State to amend the information on the day of trial; (3) permitting the State to endorse a witness on the day of trial; (4) conviction for both robbery first degree and armed criminal action violated protection against double jeopardy; (5) prosecutor commented on defendant's failure to testify; (6) the giving of Instruction No. 7, MAI-CR 2.70; and (7) allowing a witness's previous consistent statement to be read for rehabilitation. Affirmed as to the robbery count and reversed as to the armed criminal action count.

The sufficiency of the evidence is not questioned. The jury could reasonably have found that, in March, 1978, Haggard, in the company of Kenneth Smith, Wilbur Barnett and Mark Goodman, drove a truck to a point about a quarter of a mile from Casey's General Store in Sedalia. Haggard left the truck with a rifle and a stocking cap and walked toward the store. A short time later Haggard ran back to the truck with the gun and a paper sack containing money.

Goodman and Barnett testified that they were with Haggard during the evening. They testified that appellant obtained the rifle and they were with him when a part of the barrel and a part of the butt were sawed off. They stated that, after appellant returned to the truck with the sack of money, he divided the money with Smith and Barnett, but Goodman refused a share.

The cashier at Casey's testified that, a little after 10:00 P.M., a man entered the store. He pulled a stocking cap over his face so she was unable to observe his full facial features. The man had a gun which she identified as similar to the one taken from Haggard's truck after his arrest. At the man's order she placed the money from the cash register in a paper sack which the man took and left. She testified that Haggard matched the stature of the man who had committed the robbery and the part of the face which she could see before he pulled his stocking cap down matched that part of Haggard's face. A short time later, officers stopped Haggard's vehicle and discovered the sawed-off rifle in it. Some $132 was recovered from Haggard and two of his companions.

Appellant contends the court erred in denying his application for a continuance. The case was removed from Pettis County to Cooper County on a change of venue. One continuance was granted to the defendant and the case was

set for trial on June 12, 1978. Friday before the trial was set on Monday, Haggard's counsel requested a continuance, stating that he had taken the depositions of three witnesses, including Barnett and Goodman, on May 31, and had received the typed copy on that day. He stated he would not have time to read the depositions to prepare for cross-examination and possible impeachment by Monday. Two of the depositions were 25 pages in length and one about seven pages. Counsel who argued for the continuance and who was to try the case had taken the depositions.

Appellant agrees an application for a continuance is addressed to the sound discretion of the trial court and that he has the burden to demonstrate that the denial of a continuance was prejudicial to his case. State v. Lane, 551 S.W.2d 900, 906[13-16] (Mo.App. 1977). Here, appellant does not demonstrate any such prejudice. He merely speculates that, if counsel had had additional time to read the depositions, he might have been able to discover information which could be used as impeachment against one of the witnesses. Since the same counsel had taken the depositions about ten days prior to his appearance to request a continuance, he knew what the witnesses had said and could have conducted any investigation he desired during that time. Rather, counsel simply said he would not have time to read three very short depositions between Friday and Monday. No prejudice has been shown and no abuse of discretion has been demonstrated.

Appellant also complains of the court's denial of his oral request for continuance, made on the day of trial. At that time, defense counsel stated that a reading of Goodman's deposition over the weekend before the trial date had recalled to counsel the deponent's testimony regarding his having spent one year at the Warren E. Hearnes Correctional Center. According to counsel, the deponent's testimony gave some hint of treatment for a

mental disorder, although the witness denied that he had been treated for mental disease. Counsel stated that he wanted to check the records of the witness's stay at the institution in order to determine whether or not it might provide a basis for impeachment of the witness. He had been unable to obtain the records over the weekend.

The trial court's refusal of a continuance on this basis was not an abuse of its discretion to which, appellant acknowledges, the request was directed. Trial counsel had heard the deposition testimony and, knowing the approaching trial date, could have pursued the inquiry before receipt of the transcript of the deposition. No showing was made that the ruling deprived defendant of evidence which might have been of value. Counsel had adequate opportunity to prepare on this issue and his assertion that the court's ruling denied defendant assistance of counsel is without merit.

Appellant contends the court erred in permitting the State to amend the information on the day of trial to delete the words "did knowingly act together and with a common purpose of committing the acts hereinafter set out with two other individuals, and * * * ." The effect of the amendment was to charge defendant with the commission of the crimes while acting alone instead of charging that he committed them while acting with others. In State v. West, 484 S.W.2d 191, 195[4,5] (Mo. 1972), the court held there was no abuse of discretion in allowing an amendment to the information during the trial to charge that the defendant acted with others. The court held the distinction between principals and accessories has been virtually eliminated and all persons who participate in a crime may be charged, tried, convicted and punished alike. The amendment here was to delete the allegation that Haggard acted with others, but the reasoning of *West* applies. No additional or different offenses was charged and

all the elements of robbery first degree were stated in both the original and the amended information. The court did not err in allowing the amendment.

No error may be predicated upon the court's allowing the State to endorse a witness on the day of trial. The prosecutor had previously informed defense counsel of his intention to call the witness, a police officer, and defendant's counsel had taken the officer's deposition. When the State requested permission to endorse the witness, defendant's counsel replied: "I see no objection to indorsing the witness." Such waiver and the prior knowledge of defense counsel regarding the witness precludes any finding of error in the trial court's exercise of discretion.

Appellant contends the prosecuting attorney in his opening statement impermissibly commented that the defendant might not produce any evidence. During his opening statement the prosecutor said: "After all the evidence has been heard, and I assume there will be eight to ten witnesses called by the State, I do not know how many called by the defendant, if any." Appellant argues that by this statement the prosecutor was calling the attention of the jury to the defendant's right not to testify and by this means hoped to obtain a favorable inference that the failure to testify would indicate guilt.

The prosecutor in no manner commented upon the failure of the defendant to testify, there having been no opportunity for him to do so. The statement was simply that the State had eight to ten witnesses to call and the prosecutor did not know how many, if any, witnesses the defendant might call. This was not a comment on the defendant's right not to testify. See State v. Terry, 472 S.W.2d 426, 430[6] (Mo. banc 1971), vacated in part 408 U.S. 940 (1972).

Appellant contends the court erred in giving Instruc-

tion No. 7, MAI-CR 2.70. This instruction told the jury that the defendant was charged with a separate offense in each count submitted and that each offense and the evidence and law applicable to it should be considered separately. Appellant contends because of the inter-relationship between the charge of robbery first degree and the charge of armed criminal action this instruction was confusing.

Separate instructions were given to the jury concerning the robbery and armed criminal action charges. Instruction No. 7 was required by MAI-CR in that situation. Rule 20.02(a). Instruction No. 7 read with other instructions correctly informed the jury as to the necessary elements of each offense. Appellant complains that No. 7 was confusing because it would have been impossible for the jury to isolate the evidence applicable to each charge. That is not what the instruction required. It required only that, as to each of the substantive charges, the jury find the facts required under the instruction as to each offense. The complaint against Instruction No. 7 is without merit. State v. Tilley, 569 S.W.2d 346, 348-349[4-6] [7] (Mo.App. 1978); Simms v. State, 568 S.W.2d 801, 804-805[4]-[7-8] (Mo.App. 1978).

Appellant contends the court erred in allowing the State to read a statement Mark Goodman had given to police officers. On cross-examination Goodman was asked if he had ever told anyone that he did not know who robbed the store. Goodman denied ever making such a statement. By use of his deposition, counsel brought out that Goodman had said that he told a police officer that he did not know who had robbed the store. The police officer who took Goodman's statement was called as a witness and was allowed, over defendant's objection, to read the entire statement given by Goodman. There is no question the statement was given prior to the deposition testimony and there is no

question that Goodman was impeached by use of his deposition. Appellant relies upon State v. Fleming, 354 Mo. 31, 188 S.W.2d 12 (1945). In *Fleming* the court held that a prior consistent statement could be used only to the extent necessary to counter the subject on which the witness had been impeached. The court held that matters foreign to the subject on which the witness had been impeached were incompetent and inadmissible. See also State v. Askew, 570 S.W.2d 798 (Mo.App. 1978). Here, the statement given by Goodman and read to the jury covered the activities of the entire evening and was not confined to the subject matter on which he had been impeached. Therefore, the court should have confined the reading of the statement to only that portion covering the subject matter on which Goodman had been impeached.

However, even if the reading of the entire statement for purposes of rehabilitation was error, there remains the question of its prejudicial effect, if any. In State v. Degraffenreid, 477 S.W.2d 57, 64[14] (Mo. banc 1972), the court stated: "[E]rror in the admission of evidence should not be declared harmless unless it is so without question." The court also stated: "We also are mindful that error which in a close case might call for a reversal may be disregarded as harmless when the evidence of guilt is strong."

Applying these standards, the error in reading the entire statement of Goodman was harmless. There is strong evidence of guilt in this case with the testimony of Goodman and Barnett coupled with the testimony of the cashier. Further, the statement of Goodman which was read was identical to his in-court testimony and thus was cumulative. Even observing the caution noted in *Degraffenreid*, with reference to cumulative evidence, the admission of the statement was both cumulative and harmless.

Under Sours v. State, 593 S.W.2d 208 (Mo. banc 1980);

vacated Missouri v. Sours, ____ U.S. ____, 64 L.Ed.2d 820 (1980); on remand Sours v. State, ____ S.W.2d ____ (Mo. banc No. 61458, August 18, 1980), the conviction for armed criminal action cannot stand.

The judgment of conviction on Count I for robbery in the first degree is affirmed. The judgment of conviction on Count II for armed criminal action is reversed.

ROBERT R. WELBORN
Commissioner

APPENDIX I

William Scott SOURS, Appellant,

v.

STATE of Missouri, Respondent.

No. 61458.

Supreme Court of Missouri,
En Banc.

Aug. 18, 1980.

Defendant moved to set aside convictions based on guilty pleas to information in two counts charging robbery first degree by means of dangerous and deadly weapon and armed criminal action. The Circuit Court, Jasper County, Ben F. Pyle, J., denied the motion, and defendant appealed. The Supreme Court, Welliver, J., 593 S.W.2d 208, reversed in part and affirmed in part. On remand, 100 S.Ct. 2935, the Supreme Court, Welliver, J., held that Missouri armed criminal action statute which permitted conviction on charge of robbery first degree and on the same facts permitted conviction for armed criminal action violated the double jeopardy clause.

Affirmed in part and reversed in part.

Donnely, J., filed dissenting opinion in which Rendlen, J., concurred.

Rendlen, J., filed dissenting opinion.

1. Robbery 11

A conviction under statute covering armed criminal action for committing robbery first degree by, with, or through the use, assistance, or aid of a dangerous or deadly

weapon cannot be had without proving all elements of offense of robbery first degree. V.A.M.S. § 571.015; §§ 559.225, 560.120, 560.135 (Repealed).

2. Weapons 4

General Assembly in adopting armed criminal action statute clearly expressed its intent to authorize conviction and punishment for armed criminal action and for the underlying felony. V.A.M.S. § 559.225 (Repealed).

3. Statutes 142

Since Constitution prohibits the General Assembly from amending statutes without setting forth in full the statutes so amended, court could not construe armed criminal action statute as a mere punishment enhancement statute which amends by implication numerous felony statutes. V.A.M.S. § 559.225 (Repealed); V.A.M.S. Const. Art. 3, § 28.

4. Federal Courts 386

State Supreme Court's construction of state statute is binding on the United States Supreme Court.

5. Criminal Law 196

Missouri armed criminal action statute which permitted conviction on charge of robbery first degree and on the same facts permitted conviction for armed criminal action violated the double jeopardy clause.

David Robards, Public Defender, Joplin, for appellant.

John Ashcroft, Atty. Gen., Steven W. Garrett, Asst. Atty. Gen., Jefferson City, for respondent.

WELLIVER, Judge.

Appellant, William Scott Sours, pleaded guilty to two counts of an information filed June 20, 1977. Count I

charged appellant with first degree robbery, § 560.120, RSMo 1969, and § 560.135, RSMo Supp. 1975; Count II charged armed criminal action, § 559.225, RSMo Supp. 1976 (now § 571.015, RSMo 1978). A separate punishment was imposed for each count. Appellant sought relief from his convictions in a collateral proceeding under Rule 27.26. In *Sours* v. *State,* Mo., 593 S.W.2d 208 (1980), we reversed the judgment of the trial court insofar as it denied appellant relief from his conviction for armed criminal action, and vacated and set aside that conviction on the ground that the conviction placed appellant twice in jeopardy for the same offense. We affirmed the judgment insofar as it denied appellant relief from his conviction for robbery first degree. The United States Supreme Court vacated our decision and remanded the case for reconsideration in the light of *Whalen* v. *United States,* 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). *Missouri* v. *Sours,* ____ U.S. ____, 100 S.Ct. 2935, 64 L.Ed.2d 820. The detailed facts and prior procedural history of this case may be found in this Court's earlier opinion, 593 S.W.2d at 210.

The United States Supreme Court has never decided whether imposing separate punishments in a single proceeding both for the offense of committing a felony by means of a dangerous and deadly weapon and for the commission of the felony violates the double jeopardy clause of the federal Constitution. The Court expressly declined to rule on this issue in *Simpson* v. *United States,* 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed.2d 70 (1978). *Cf. Whalen* v. *United States,* 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). Each time a similar double jeopardy question has been before the United States Supreme Court, it has found it unnecessary to address the constitutional question, because it has been able to find that the legislature did not intent to separately punish the two offenses involved. *Whalen* v. *United States,* 445 U.S. 684, 100 S.Ct. 1432, 1435 (1980);

Simpson v. *United States*, 435 U.S. 6, 11, 98 S.Ct. 909, 912, 55 L.Ed.2d 70 (1978); *Iannelli* v. *United States*, 420 U.S. 770, 785-86 nn. 17-18, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975). *See Jeffers* v. *United States*, 432 U.S. 137, 155, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977). No United States Supreme Court opinion has considered a statute that contained wording similar to or identical to that found in Missouri's armed criminal action statute.

In *Whalen*, the defendant was convicted of rape, D.C.Code Ann. § 22-2801, and of felony murder, *i.e.*, the killing of the rape victim in the course of the rape, D.C.Code Ann. § 22-2401. He was sentenced to consecutive terms of imprisonment of 20 years to life for first degree murder, and of 15 years to life for rape. The District of Columbia Court of Appeals affirmed, 379 A.2d 1152. The United States Supreme Court reversed, holding that under D.C. Code Ann. § 23-112,[1] Congress did not intend that multiple punishments be imposed for two offenses arising out of the same criminal transaction unless each offense requires proof of a fact which the other does not. The Court stated that

> Congress did not authorize consecutive sentences for rape and for a killing committed in the course of the rape, since it is plainly not the case that "each provi-

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[1]D.C. Code Ann. § 23 112 provides:

> A sentence imposed on a person for conviction of an offense shall, unless the court imposing such sentence expressly provides otherwise, run consecutively to any other sentence imposed on such person for conviction of an offense, whether or not the offense (1) arises out of another transaction, or (2) arises out of the same transaction and requires proof of a fact which the other does not.

The Court stated that, although the phrasing of this statute was "less than felicitous," it would be construed to mean "that multiple punishments cannot be imposed for two offenses arising out of the same criminal transaction unless each offense 'requires proof of a fact which the other does not.'" 445 U.S. at 691, 100 S.Ct. at 1438.

> sion requires proof of a fact which the other does not." A conviction for killing in the course of a rape cannot be had without provng all the elements of the offense of rape. See *United States* v. *Greene,* 160 U.S.App. D.C. 21, 489 F.2d 1145, 1158 (1973). Cf. *Harris* v. *Oklahoma,* 433 U.S. 682,-683, 97 S.Ct. 2912, 2913, 53 L.Ed.2d 1054 [1977].

445 U.S. at 693, 100 S.Ct. at 1439. The Court expressly reserved the question whether, had Congress clearly intended to impose multiple punishments for the same offense, the imposition of such punishment would violate the double jeopardy clause. Before holding that the Court would decide the question of statutory interpretation without deferring to the interpretation of the District of Columbia Court of Appeals, the Court carefully distinguished the question of statutory interpretation from the constitutional question. The Court stated that, if the matter of whether it must defer to the construction given D.C.Code Ann. §§ 22-2801 and 22-2401 by the District of Columbia Court of Appeals were absent, "we would as a matter of course first decide the petitioner's statutory claim, and, only if that claim were rejected, would we reach the constitutional issue. See *Simpson* v. *United States,* 435 U.S. 6, 11-12, 98 S.Ct. 909, 912, 55 L.Ed.2d 70." 445 U.S. at 687, 100 S.Ct. at 1435. Accordingly, since the Court did not reject the petitioner's statutory claim, it did not reach the constitutonal issue presented.[2]

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[2]The Court stated:

> Because we have concluded that the District of Columbia Court of Appeals was mistaken in believing that Congress authorized consecutive sentences in the circumstances of this case, and because that error denied the petitioner his constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress, we reverse the judgment of the Court of Appeals.

(Continued on next page)

Mr. Justice Blackmun, concurring in the judgment in *Whalen* (Mr. Justice White filed an opinion concurring in part and concurring in the judgment and Mr. Justice Rehnquist filed a dissenting opinion in which Mr. Chief Justice Burger joined) stated that prior cases had wrongly suggested:

> that the Double Jeopardy Clause may prevent the imposition of cumulative punishments in situations in which the Legislative Branch *clearly intended* that multiple penalties be imposed for a single criminal transaction. See *Simpson* v. *United States,* 435 U.S. 6, 11-13, 98 S.Ct. 909, 912, 55 L.Ed.2d 70 (1978); *Jeffers* v. *United States,* 432 U.S. 137, 155, 97 S.Ct. 2207, 2218, 53 L.Ed.2d 168 (1977) (plurality opinion). I believe that the Court should take the opportunity presented by this case to repudiate those dicta squarely, and to hold clearly that the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed. I must concede that the dicta that seemingly support a contrary view have caused confusion among state courts that have attempted to decipher our pronouncements concerning the Double

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Footnote continued
445 U.S. at 690, 100 S.Ct. at 1437.

Mr. Justice Rehnquist, in his dissent in *Busic* v. *United States,* ____ U.S. ____, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980), considered the decision in *Whalen* to have decided the very issue which it erpressly reserved. He stated: "In *Whalen* v. *United States,* 445 U.S. 684, 100 S.Ct. 1432, 55 L.Ed.2d 70 (1980), six Members of this Court held that Congress' intent to impose cumulative punishments at a single criminal proceeding completely controlled the question of double jeopardy." ____ U.S. at ____, 100 S.Ct. at 1759. The Court in *Whalen* in fact held that the case involved a congressional intent *not to impose* cumulative punishments at a single criminal proceeding. 445 U.S. at 693, 100 S.Ct. at 1439. Perhaps it is noteworthy that eight members of the Court did not join in Mr. Justice Rehnquist's reading of the holding of *Whalen.*

Jeopardy Clause's role in the area of multiple punishments.

445 U.S. at 697, 100 S.Ct. at 1441. Clearly, the five justices who joined in the opinion of the Court in *Whalen* (Justices Stewart, Powell, Stevens, Brennan, and Marshall) declined Justice Blackmun's invitation to hold that the question of what punishments are constitutionally permissible can be reduced to the question of what punishment the legislature intended to be imposed. The two questions remain distinct.[3] The opinion of the Court in *Whalen* cited *Simpson* with approval for its separation of the statutory claim from the constitutional issue and for its avoidance of the constitutional issue by finding that the legislature did not intend multiple punishments. 445 U.S. at 686, 100 S.Ct. at 1435.

Our original opinion discussed in detail two recent United States Supreme Court cases in which the question whether the legislature intended to subject the defendant to multiple penalties for a single criminal transaction was carefully distinguished from the question whether cumulative punishments for the two offenses are constitutionally permissible. *Simpson* v. *United States,* 435 U.S. 6, 11, 98 S.Ct. 909, 912, 55 L.Ed.2d 70 (1978); *Jeffers* v. *United States,* 432 U.S. 137, 155, 97 S.Ct. 2207, 53 L.Ed.2d

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[3]Our refusal to collapse the constitutional question into the question of legislative intent does not commit us to the assumption, criticized by Mr. Justice Rehnquist, "that any particular criminal transaction is made up of a determinable number of constitutional atoms that the legislature cannot further subdivide into separate offenses." *See Whalen,* 445 U.S. at 701, 100 S.Ct. at 1443 (Mr. Justice Rehnquist, dissenting). On the contrary, we recognize that the legislature may divide the criminal transaction into its subatomic particles, into protons and neutrons and electrons, into particles of different electrical charges and weights and spins. We hold only that, once the definition of a crime is fixed as a configuration of such elements, the state may not, consistently with the due process clause and the double jeopardy clause, impose separate punishments both for the neutron and for the atom of which it is a part.

168 (1977) (plurality opinion). See *Sours* v. *State*, 593 S.W.2d 208, 214-16 (Mo. 1980).

The decision of the United States Supreme Court to vacate the original judgment of this Court and to remand this case "for further consideration in light of *Whalen* v. *United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980)," mandates that we reexamine the intent of the General Assembly in enacting § 559.225, RSMo Supp. 1976. In *Whalen*, the Court determined that Congress did not intend to punish the petitioner both for committing rape and for committing a killing in the course of the rape. In reaching this conclusion, the Court applied to D.C.Code Ann. § 23-112 the doctrine of *Blockburger* v. *United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) as "a rule of statutory construction." 445 U.S. at 691, 100 S.Ct. at 1438. In *Blockburger*, the Court held that "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. at 304, 52 S.Ct. at 182. The *Blockburger* rule has often been cited by the Court. At times it has been presented as a rule of statutory construction, but more often it has been used as the definition of "same offense" for double jeopardy purposes.[4]

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[4]In numerous decisions of the United States Supreme Court from 1902 to 1959, the same evidence test was uniformly treated as the definition of sameness of offense for double jeopardy purposes. The same evidence test was used more frequently in the single prosecution multiple punishment context than it was in the multiple prosecution context. *Harris* v. *United States*, 359 U.S. 19, 23, 24, 79 S.Ct. 560, 564, 3 L.Ed.2d 597 (1959) (single proceeding; convictions and punishments for purchasing heroin from an unstamped package, a violation of 26 U.S.C. § 470(a), and for receiving and concealing the same knowing it to have been unlawfully imported, a violation of 21 U.S.C. § 174, affirmed; offenses held distinct under same evidence test); *Gore* v. *United States*, 357 U.S. 386,

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Whalen v. *United States*, 445 U.S. at 692, 100 S.Ct. at 1438 (1980); *Simpson* v. *United States*, 435 U.S. 6, 11, 98 S.Ct. 909, 912, 55 L.Ed.2d 70 (1978); *Brown* v. *Ohio*, 432 U.S. 161, 166, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977); *Jeffers* v. *United States*, 432 U.S. 137, 151, 97 S.Ct. 2207, 2216, 53 L.Ed.2d 168 (1977) (plurality opinion) (see opinion of White, J., concurrng in part and dissenting in part, at 158, 97 S.Ct. at 2220); *Iannelli* v. *United States*, 420 U.S. 770, 785 n. 17, 95 S.Ct. 1284, 1293 n. 17, 43 L.Ed.2d 616 (1975).

Footnote continued

388 91, 78 S.Ct. 1280, 1282 1283, 2 L.Ed.2d 1405 (1958) (single proceeding; convictions and punishments for sale and distribution of heroin and cocaine not in the original stamped package, a violation of 26 U.S.C. § 4704(a), for sale of the drugs not pursuant to an order written on the requisite Treasury form, a violation of 26 U.S.C. § 4705(a), and for facilitating concealment and sale of the drugs, a violation of 21 U.S.C. § 174, affirmed; offenses held distinct under same evidence test); *Pereira* v. *United States*, 347 U.S. 1, 9, 11 12, 74 S.Ct. 358, 363, 98 L.Ed. 435 (1954) (single proceeding; convictions and punishments for mail fraud a violation of 18 U.S.C. § 1341, for transporting stolen property in interstate commerce, a violation of 18 U.S.C. § 2314, and for conspiracy to commit both offenses, a violation of 18 U.S.C. § 371 affirmed; offenses held distinct under same evidence test); *United States* v. *Michener*, 331 U.S. 789, 67 S.Ct. 1509, 91 L.Ed. 1818 (1947) (per curiam) (single proceeding; convictions and punishments for procuring a plate from which genuine $10 Federal Reserve Notes had been printed, and of having possession of such a plate, violations of 18 U.S.C. § 264; offenses held distinct under same evidence test; reversing 157 F.2d 616 (8th Cir. 1946)); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 787 89, 66 S.Ct. 1125, 1128 1129, 90 L.Ed. 1575 (1946) (single proceeding; convictions and punishments for conspiracy in restraint of trade, monopolization, and conspiracy to monopolize under Anti Trust Sherman Act; offenses held distinct under same evidence test); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 552, 63 S.Ct. 379, 388, 87 L.Ed. 443 (1943) (single proceeding; convictions for 56 instances of defrauding the United States through collusive bidding on P.W.A. projects, violations of 18 U.S.C. §§ 80, 83, and separate forfeitures of $2,000 per instance plus double damages affirmed; the incidence of fraud on each project held distinct offense under same evidence test); *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932)

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In *Whalen*, the Court stated that the *Blockburger* rule had been consistently relied on ever since it was first stated in 1932:

> to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively. The asumption underlying the rule is

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Footnote continued
(single proceeding; convictions and punishments for sale of morphine not in or from the original stamped package and for sale not pursuant to a written order on the requisite Treasury form affirmed; offenses held distinct under same evidence test); *King* v. *United States*, 280 U.S. 521, 50 S.Ct. 65, 74 L.Ed. 590 (1929) (per curiam) (two proceedings; plea of former jeopardy rejected where sentence for selling morphine not in or from the original stamped package was imposed in one proceeding and executed before second indictment charging interstate shipment of drugs by a person who has not registered and paid the special tax required was brought; offenses held distinct under same evidence test; affirming 31 F.2d 17 (9th Cir. 1929)); *Albrecht* v. *United States*, 273 U.S. 1, 11 12, 47 S.Ct. 250, 253 254, 71 L.Ed. 505 (1927) (single proceeding; convictions and punishments for four counts of illegal possession of liquor and four counts of illegal sale of liquor in violation of the National Prohibition Act and one count of maintaining a common nuisance affirmed; sale and possession held distinct under same evidence test); *Morgan* v. *Devine*, 237 U.S. 632, 638 39, 641, 35 S.Ct. 712, 713 14, 59 L.Ed. 1153 (1915) (single proceeding; convictions and sentences on guilty pleas to charges of unlawful forcible breaking into a post office building with intent to commit larceny, a violation of § 192 of the Penal Code, and of stealing postage stamps and funds belonging to the United States, a violation of § 190 of the Penal Code, affirmed; offenses held distinct under the same evidence test; using same evidence test for two purposes both to determine the legislative intent and separately to respond to the double jeopardy claim); *Ebeling* v. *Morgan*, 237 U.S. 625, 630 31, 35 S.Ct. 710, 711 12, 59 L.Ed. 1151 (1915) (single proceeding; convictions and punishments for six counts of tearing, cutting, and injuring United States mailbags, in violation of § 189 of the Federal Criminal Code, affirmed; offenses held distinct under the same evidence test); *Gavieres* v. *United States*, 229 U.S. 338, 343 44, 31 S.Ct. 421, 422 23, 55 L.Ed. 489 (1911) (two proceedings; conviction and punishment for insulting a public officer by deed or word in his presence, a violation of article 257 of the Penal Code of the Philippine Islands, after

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> that Congress ordinarily does not intend to punish the same offense under two different statutes. Accordingly, where two statutory provisions proscribe the "same offense," they are construed not to authorize cumulative punishments *in the absence of a clear indication of contrary legislative intent.*

455 U.S. at 691, 100 S.Ct. at 1438. (Emphasis added.)

Footnote continued
previous conviction because of the same words and conduct of behaving in an indecent manner in a public place, a violation of an ordinance of the city of Manila; offenses held distinct under the same evidence test); *Carter* v. *McClaughry*, 183 U.S. 365, 394 95, 398, 22 S.Ct. 181, 192 193, 194, 46 L.Ed. 236 (1902) (single court martial proceeding; conviction and punishment for conspiring to defraud the United States, a violation of the 60th article of war, for causing false and fraudulent claims to be made against the United States, a violation of the 60th article of war, for conduct unbecoming an officer and a gentleman, a violation of the 61st article of war, and for committing embezzlement, a violation of § 5488 of the Revised Statutes of the United States and of the 62d article of war, held to be within the jurisdiction of the court martial; offenses held distinct under the same evidence test); *In re Nielsen*, 131 U.S. 176, 188, 190 91, 9 S.Ct. 672, 676 77, 33 L.Ed. 118 (1889) (two indictments; conviction and punishment on a guilty plea to bigamy, *i.e.* living with more than one woman as husband and wife continuously from October 15, 1885, to May 13, 1888; second indictment charged adultery with one of the two women occurring on May 14, 1888; convicted for unlawful cohabitation held to bar a subsequent prosecution for adultery under the same evidence test, since the continuous bigamy offense necessarily implied sexual intercourse, so that proof of adultery did not require proof of a fact not also required to show bigamy).

The claim that the meaning of the phrase "same offense" in the multiple punishment context is in fact different from the meaning of the phrase "same offense" in the multiple prosecution context requires justification. We can find nothing in the legislative intent to impose two punishments, one for the greater offense and one for the lesser included offense, which would justify refusing to classify the two crimes as the "same offense" under the double jeopardy clause. If a state legislature could manipulate the meaning of the phrase "same offense" as it is used in the fifth amendment to the Constitution, there would be no reason to suppose that the Constitution prevents a legislature from authorizing, by a clear expression of intent, the sequential prosecution and punishment of the greater and lesser included offense.

I. LEGISLATIVE INTENT

[1,2] Applyng *Blockburger* as a rule of statutory construction to the armed criminal action statute[5] and the statute defining the underlying offense, in this case the

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[5]Section 559.225, RSMo Supp. 1976, defined the crime of armed criminal action and fixed the punishment for that crime as follows:

559.225. Armed Criminal Action penalty exceptions. 1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than five years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committee [sic] by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of live calendar years.

3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than ten years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed, by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of ten calendar years.

4. The provisions of this section shall not apply to the felonies defined in sections 559.005, 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo.

robbery first degree statute,[3] we find that it is plainly not the case that "each provision requires proof of a fact which the other does not." A conviction for committing robbery first degree "by, with, or through the use, assistance, or aid of a dangerous or deadly weapon," § 559.225, RSMo Supp. 1976, cannot be had without proving all the elements of the offense of robbery first degree. *See Illinois* v. *Vitale*, ____ U.S. ____, ____, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980); *Whalen*, 445 U.S. at 694, 100 S.Ct. at 1439; *Harris* v. *Oklahoma*, 433 U.S. 682, 682-83, 97 S.Ct. 2912, 2913, 53 L.Ed.2d 1054 (1977); *United States* v. *Greene*, 160 U.S. App.D.C. 21, 489 F.2d 1145, 1158 (1973). Thus, the General Assembly should be presumed not to have intended that punishment be imposed under both statutes. 455 U.S. 691, 100 S.Ct. at 1438. Nevertheless, we find that

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[3]The underlying felony in this case was robbery first degree, as it was defined in § 560.120, RSMo 1969, and the punishment for which was prescribed in § 560.135, RSMo Supp. 1975. Section 560.120, RSMo 1969, provided:

> Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person; or who shall be convicted of feloniously taking the property of another from the person of his wife, servant, clerk or agent, in charge thereof, and against the will of such wife, servant, clerk or agent, by violence to the person of such wife, servant, clerk or agent, or by putting him or her in fear of some immediate injury to his or her person, shall be adjudged guilty of robbery in the first degree.

Section 560.135, RSMo Supp. 1975, provided:

> Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon and every person convicted of robbery in the first degree by any other means shall be punished by imprisonment by the division of corrections for not less than five years; every person convicted of robbery in the second degree shall be punished by imprisonment by the division of corrections not exceeding five nor less than three years; every person convicted of robbery in the third degree shall be punished by imprisonment by the division of corrections not exceeding five years.

the General Assembly has in clear and unequivocal terms expressed in § 559.225, RSMo Supp. 1976, its intent to authorize conviction and punishment for armed criminal action and for the underlying felony. In arriving at this conclusion, we apply every test and standard available to us under Missouri law. First, we consider the plain meaning of the language used. We consider the requirements of our own constitution regarding construction of the statute. We examine every reported decision involving convictions under the armed criminal action statute, in order to discern the application given the statute by Missouri's courts and prosecutors in prior cases. We examine the form of the information or indictment used to charge armed criminal action, both before and after a standard form for charging armed criminal action was approved; and we examine the form of the jury instructions used in submitting a charge of armed criminal action, both before and after a patterned instruction for submitting armed criminal action was approved.

The language of the armed criminal action statute shows that the General Assembly clearly intended that a defendant convicted of armed criminal action shall be punished for both armed criminal action and for the underlying felony. Section 559.225, RSMo Supp. 1976 (now § 571.015, RSMo 1978) expressly provides that "any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon *is also guilty of the crime of armed criminal action.*" (Emphasis added.) The armed criminal action statute provides in three separate subsections for punishment of not less than three years' imprisonment for the first offense, not less than five years' imprisonment for the second offense, and not less than ten years' imprisonment for the third. The legislative intent to impose punishment both for the underlying felony and for

the "compound" offense of which it is a part is clearly and unambiguously expressed in the following sentence, which appears in each of the three subsections: "The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous [instrument] or deadly weapon." There is nothing ambiguous or uncertain about the meaning of this provision. The statute provides that the state may punish for any felony and also punish for that felony a second time in virtue of its having been committed through the use of a dangerous or deadly weapon. This is the plain meaning of the words used, and it is the unmistakable intent of our General Assembly. Clearly, § 559.225, RSMo Supp. 1976, provides for more than the mere enhancement of the sentence for the underlying felony. It calls for conviction of a second crime and for the imposition of a second sentence. Consequently, we cannot avoid the question whether the double jeopardy clause prohibits the imposition in a single proceeding of multiple punishments for the same offense.

What was said in *City of St. Louis* v. *Crowe*, 376 S.W.2d 185 (Mo. 1964) is fully applicable to our armed criminal action statute:

> This section of the statutes now under scrutiny is clear and unambiguous in its language. It is not susceptible of more than one construction. Therefore, we may not restor to any extraneous matter because there is no room for construction of such language. *State ex rel. Bell* v. *Phillips Petroleum Co.*, 349 Mo. 360, 160 S.W.2d 764; *Rathjen* v. *Reorganized School Dist. R II of Shelby County*, 365 Mo. 518, 284 S.W.2d 516. We have no right to read into the statute an intent which is contrary to the legislative intent made evident

> by the phraseology employed. *State ex inf. Rice ex rel. Allman* v. *Hawk*, 360 Mo. 490, 228 S.W.2d 785; *Steggall* v. *Morris*, 363 Mo. 1224, 258 S.W.2d 577. The legislative pronouncement means what it says . . . .

376 S.W.2d at 189-90. *See State ex rel. Stevenson* v. *Kirkpatrick*, 536 S.W.2d 740, 741 (Mo. banc 1976); *State ex rel. Dravo Corp.* v. *Spradling*, 515 S.W.2d 512, 517 (Mo. 1974); *Missourians for Honest Elections* v. *Missouri Elections Commission*, 536 S.W.2d 766, 775 (Mo.App. 1976); *Consolidated School District No. 1 of Jackson County* v. *Bond*, 500 S.W.2d 18, 21 (Mo.App. 1973). *See also* J. Sutherland, 2A Statutes and Statutory Construction § 46.01, pp. 48-49 (C. Sands 4th ed. 1973).

[3] We note that we are not free to construe the armed criminal action statute as a mere punishment-enhancement statute which amends by implication numerous felony statutes, because Mo. Const. art. III, § 28 prohibits the General Assembly from amending statutes without setting forth in full the statutes so amended. *Sours* v. *State*, 593 S.W.2d 208, 222 n. 10 (Mo. banc 1980); *State* v. *Valentine*, 584 S.W.2d 92, 96 (Mo. banc 1979). *Cf. State* v. *Hudson*, 562 S.W.2d 416 (Tenn. 1978).

The uniformity of the interpretation and application of § 559.225, RSMo Supp. 1976 (§ 571.015, RSMo 1978, confirms that it plainly authorizes punishment both for armed criminal action and for the underlying felony. Following the original *Sours* opinion our prosecutors and penal authorities indicated informally to this Court that they believed that as many as four hundred to six hundred prior convictions might be affected by the opinion. In the four years since the enactment of the statute, the appellate courts of this state have been called upon literally dozens of times to review convictions for both armed criminal ac-

tion and the underlying felony.[7] In none of these cases was it ever questioned that the legislature intended to say exactly what it said in the armed criminal action statute. No case has been discovered where the armed criminal action statute has not been understood by our trial and appel-

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[7]*State* v. *Valentine*, 584 S.W.2d 92 (Mo. banc 1979) (per Rendlen, J.) (affirming unspecified sentences for both armed criminal action and robbery first degree); *State* v. *Treadway*, 558 S.W.2d 646 (Mo. banc 1977), *cert denied*, 439 U.S. 838, 99 S.Ct. 124, 58 L.Ed.2d 135 (1978) (per Donnelly, J.) (three year sentence for armed criminal action and fifteen years for robbery first degree, to run consecutively); *State* v. *Merritt*, 591 S.W.2d 107 (Mo.App. 1979) (per Manford, J.) (five years for armed criminal action to run concurrently with consecutive sentences of twenty years for robbery first degree and five years for assault with intent to kill with malice); *State* v. *Irvin*, 590 S.W.2d 699 (Mo.App. 1979) (per Clemens, Sr. J.) (five years for armed criminal action to run consecutively to twenty years for robbery); *Riley* v. *State*, 588 S.W.2d 738 (Mo.App. 1979) (per Kelly, J.) (three years for armed criminal action to run consecutively to concurrent sentences of seventeen years each for two counts of robbery first degree and one count of assault with intent to kill. *State* v. *Pollard*, 588 S.W.2d 212 (Mo.App. 1979) (per Swofford, J.) (five years for armed criminal action to run concurrently with five years for sodomy and to run consecutively to twenty five years with rape. *State* v. *Medley*, 588 S.W.2d 55 (Mo.App. 1979) (per Pudlowski, J.) (three years for armed criminal action and twenty years for robbery first degree); *State* v. *Mays*, 588 S.W.2d 6 (Mo.App. 1979) (per Reinhard, J. J.) (five years for armed criminal action to run consecutively to fifteen years for robbery first degree); *State* v. *Tyler*, 587 S.W.2d 918 (Mo.App. 1979) (per Kennedy, J.) (twenty five years for armed criminal action to run consecutively to seventy five years for robbery first degree, seventy five years for rape, and ten years for kidnapping); *State* v. *Williams*, 587 S.W.2d 618 (Mo.App. 1979) (per Crist, J.) (five years for armed criminal action to run concurrently with twenty years for robbery first degree); *State* v. *Gant*, 586 S.W.2d 755 (Mo.App. 1979) (per Somerville, P. J.) (reversing conviction for armed criminal action where armed criminal action in conjunction with assault was charged but armed criminal action in conjunction with murder was submitted in jury instructions); *State* v. *Crews*, 585 S.W.2d 131 (Mo.App. 1979) (per Gunn, J.) (sentences unspecified; underlying felony unspecified; convictions for armed criminal action, first degree robbery, and three counts of assault with intent to kill with malice); *State* v. *Brown*,

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late judges and by our prosecutors, assistant attorneys general, and Attorney General to mean that punishment may be imposed once for a felony and a second time ("in addition to" for the same felony if it was committed by the

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Footnote continued
584 S.W.2d 413 (Mo.App. 1979) (per Reinhard, P. J.) (thirty years for one count of armed criminal action to run concurrently with ten years each for two counts of robbery first degree); *State* v. *Jones*, 583 S.W.2d 561 (Mo.App. 1979) (per Clemens, J.) (three years for armed criminal action to run consecutively to robbery first degree) (reversed and remanded for error in admission of hearsay); *State* v. *Burse*, 583 S.W.2d 221 (Mo.App. 1979) (per Crist, J.) (thirty five years for armed criminal action to run concurrently with eight years for attempted robbery first degree); *State* v. *Davidson*, 583 S.W.2d 208 (Mo.App. 1979) (per Higgins, Sp. J.) (unspecified sentences for one count of armed criminal action and two counts of robbery first degree); *State* v. *Hutchinson*, 582 S.W.2d 350 (Mo.App. 1979) (per Crist, J.) (twenty five years for one count of armed criminal action to run concurrently with concurrent sentences of twenty five years each for eight counts of robbery first degree); *State* v. *Hawkins*, 582 S.W.2d 333 (Mo.App. 1979) (per Pritchard, J.) (underlying felony unspecified; three years for armed criminal action to run consecutively to ten years for robbery first degree and fifteen years for assault with intent to do great bodily harm with malice) (reversed for defect in jury panel); *State* v. *Burns*, 581 S.W.2d 590 (Mo.App. 1979) (per Reinhard, P. J.) three years for armed criminal action to run consecutively to fifteen years for robbery first degree); *State* v. *Bargeon*, 578 S.W.2d 364 (Mo.App. 1979) (per Gunn, J.) (twenty five years for armed criminal action to run consecutively to seventy five years for rape); *State* v. *Jones*, 578 S.W.2d 286 (Mo.App. 1979) (per Reinhard, P. J.) (underlying felony unspecified; five years for armed criminal action to run consecutively to consecutive sentences of ten years for forcible rape and five years for robbery first degree); *State* v. *Carter*, 577 S.W.2d 109 (Mo.App. 1978) (per Welborn, Sp. J.) (five years for armed criminal action to run concurrently with ten years for robbery first degree); *State* v. *Woods*, 578 S.W.2d 942 (Mo.App. 1978) (per Clemens, J.) (three years for armed criminal action to run consecutively to twenty years for robbery first degree); *State* v. *Tilley*, 569 S.W.2d 346 (Mo. App. 1978) (per Reinhard, J.) (fifteen years for armed criminal action to run consecutively to ten years for attempted robbery in the first degree); *Simms* v. *State*, 568 S.W.2d 801 (Mo.App. 1978) (per McMillian, J.) (three years for armed criminal action to run consecutively to twelve years for robbery first degree).

use, aid, or assistance of a dangerous or deadly weapon. No amount of analysis premised on presumptions concerning legislative intent can obscure the fact that § 559.225, RSMo Supp. 1976, provides that a person guilty of armed criminal action shall be punished for both of two crimes, one of which by definition includes every element of the other.

[4] This construction of our state statute is binding on the United States Supreme Court. In *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1973), the United States Supreme Court stated: "[I]t is not our function to construe a state statute contrary to the construction given it by the highest court of a State." *Id.* at 256, 94 S.Ct. at 1081; *O'Brien* v. *Skinner*, 414 U.S. 524, 531, 94 S.Ct. 740, 743, 38 L.Ed.2d 702 (1973).

In the reported decisions involving convictions for both armed criminal action and the underlying felony, the armed criminal action charge was entered in a separate count from that charging the underlying felony. The two-count information in the instant case is typical. Count I alleged:

> that on or about the 14th day of May, 1977, in the County of Jasper and State of Missouri, WILLIAM S. SOURS did wilfully, unlawfully and feloniously by means of a certain dangerous and deadly weapon, to-wit: a handgun, take, stea[l] and carry away Nine Hundred Forty-nine and 06/100 ($949.06) Dollars, lawful money of the United States of America, the money and personal property of Mr. Quick, then and there in the lawful care and custody of Kendall Carnes, by then and there putting the said Kendall Carnes in fear of an immediate injury to his person and then and there did feloniously rob, take, steal and carry away the said money and personal property from the person of,

in the presence of and against the will of the said Kendall Carnes with the felonious intent to permanently deprive the owner of the use thereof and to convert the same to his own use.

Count II alleged:

that on or about the 14th day of May, 1977, in the County of Jasper and State of Missouri, WILLIAM S. SOURS did wilfully, unlawfully and feloniously commit a felony, to-wit: Robbery First Degree, by and with the use, aid and assistance of a dangerous or deadly weapon to-wit: a handgun.

See Jeffers v. *United States*, 432 U.S. 137, 150 n. 16, 97 S.Ct. 2207, 2216 n. 16, 53 L.Ed.2d 168 (1977).

This Court recently approved a patterned charge for use in charging armed criminal action, MACH Cr 25.02, the patterned charge is as follows:

The (Grand Jurors) (Circuit Attorney) (Prosecuting Attorney) of the (City) (County) of _____, State of Missouri, charge(s) that the defendant, in violation of Section 571.015, RSMo, committed the class A felony of armed criminal action, punishable upon conviction under Section (571.015.1) (571.015.2) (571.-015.3), RSMo, in that (on) (on or about [*date*], in the (City) (County) of _____, State of Missouri, the defendant [*insert one of the following, omitting number and brackets*]

[*1*] committed the felony of [*name of felony*] charged in Count __, all allegations of which are incorporated herein by reference, and

[*2*] committed the felony of [*name of felony, alleging all essential elements thereof with the same specificity as that used in a charge of that felony*], and

The defendant committed the foregoing felony of [*name of felony*] by, with and through the use, assistance and aid of a (dangerous instrument (deadly weapon) (, and)

((On) (On or about) [*date*] in [*identify the particular court and jurisdiction*], the defendant was convicted of the offense of armed criminal action (, and))

((On) (On or about) [*date*] in [*identify the particular court and jurisdiction*], the defendant was convicted of the offense of armed criminal action)).

Both pre-patterned and patterned charges indicate that our statute has been universally interpreted to permit the charging of armed criminal action and the underlying felony in separate counts.

Similarly, the instructions commonly used to submit to the jury the question of the guilt or innocence of the accused of armed criminal action and of the underlying felony illustrate that the statute has uniformly been interpreted to authorize separate conviction and punishment for both armed criminal action and the underlying felony, as does our recently adopted pattern jury instruction, MAI-CR 25.02. The verdict-directing instructions used in *State* v. *Treadway,* 558 S.W.2d 92 (Mo. banc 1979) are typical:

INSTRUCTION NO. 7

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

First, that on September 25, 1976, in the City of St. Louis, State of Missouri, Rotha Grimes was in charge of a purse owned by Jerry Hanks, and

Second, that at that time and place the defendant, acting with another, took the property from Rotha

Grimes against her will by causing her to fear immediate injury to her person, and

Third, that the defendant, acting with another, took the property with the intent to permanently deprive Rotha Grimes and Jerry Hanks of the property and to convert it or any part of it to the use of the defendant and another, and

Fourth, that the defendant acted either alone or knowingly and with common purpose together with another in the conduct referred to in the above paragraphs,

then you will find the defendant guilty under Count I of robbery in the first degree.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of the foregoing, you must find the defendant not guilty of that offense.

MAI-CR 7.60 modified by 2.12

Submitted by the State

Given by the Court

INSTRUCTION NO. 8

As to Count II, if you find and believe from the evidence beyond a reasonable doubt:

First, that the defendant, acting with another, committed the crime of robbery in the first degree, a felony, as defined heretofore in Instruction No. 7, and

Second, that the perpetration of the aforesaid felony was done through the aid or use of a weapon, to-wit: a gun, held by either the defendant or his accomplice, and

Third, that the defendant acted either alone or knowingly and with common purpose together with another in the conduct referred to in the above paragraph,

then you will find the defendant guilty under Count II or armed criminal action.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of the foregoing, then you must find the defendant not guilty under Count II of that offense.

Not in MAI-CR

Modified by 2.12

Submitted by the State

Given by the Court

INSTRUCTION NO. 9

The defendant is charged with a separate offense in each Count submitted to you. Each offense and the evidence and law applicable to it should be considered separately. Any evidence which was or has been limited to one of the offenses charged or one purpose should be considered by you as to another offense charged or for any other purpose.

You may find the defendant guilty or not guilty on any or all of the Counts submitted against him.

MAI-CR-2.70

Given by the Court

Our pattern jury instructions for use in submitting armed criminal action, MAI-Cr2d 25.02, were promulgated effective January 1, 1979. The verdict-directing instruction

which was provided for use in cases involving a first offender under the armed criminal action statute, and "where the underlying felony is charged in a separate count," is as follows:

> (As to Count ____, if) (If) you find and believe from the evidence beyond a reasonable doubt:
>
> First, that the defendant is guilty under County ___ of ([*name of the offense, if it is a felony under all circumstances*]) ([*name of the offense, and if it is a misdemeanor under some circumstances and a felony under other circumstances, include the circumstances making it a felony*]), and
>
> Second, that the defendant committed that offense by, with or through the use, assistance or aid of a (dangerous instrument) (deadly weapon),
>
> then you will find the defendant guilty (under Count ___) of armed criminal action.
>
> However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.
>
> If you do find the defendant guilty (under Count ___) of armed criminal action, you will assess and declare his punishment at imprisonment by the division of corrections for a term fixed by you, but not less than three years or more than life imprisonment.

We have measured the legislature's intent regarding § 559.225, RSMo Supp. 1976 (now § 571.015, RSMo 1978) by every test and standard available to us under the law of Missouri. The conclusion is inescapable that the Missouri General Assembly did intend to impose punishment for armed criminal action "in addition to any punishment pro-

vided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous [instrument] or deadly weapon." The General Assembly did clearly intend to impose two separate punishments for armed criminal action and the lesser included offense.

At this point, the mandate that we reconsider in light of *Whalen* offers little help or guidance. In Whalen it was determined that Congress had not intended cumulative punishments. The constitutional question could be and was reserved by the Court. In other cases in which the legislative intent was less clear than it is in the case of our armed criminal action statute, the constitutional question also has been reserved. *Simpson* v. *United States,* 435 U.S. 6, 11 98 S.Ct. 909, 912, 55 L.Ed.2d 70 (1978); *Iannelli* v. *United States,* 420 U.S. 770, 785-86 nn. 17-18, 95 S.Ct. 1284, 1293-1294 nn. 17-18, 43 L.Ed.2d 616 (1975). *See Jeffers* v. *United States,* 432 U.S. 137, 155, 97 S.Ct. 2207, 2218, 53 L.Ed.2d 187 (1977). The unique wording of the Missouri statute and the clear, positive and unequivocal intent to doubly punish, does not leave us a similar option. The unique wording of the armed criminal action statute dictates that we must bite the bullet and meet the federal consitutional issue.[8]

II. DOUBLE JEOPARDY AND MULTIPLE PUNISHMENT FOR THE SAME OFFENSE

There is little we can add to the analysis given the constitutional question in *Sours* v. *State,* 593 S.W.2d 208, 211-

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[8]Firm as our conviction may be that neither a citizen of Missouri nor a citizen of the United States should be twice punished for the same offense, to so hold under the Missouri Constitution would require reinterpretation of our own double jeopardy clause, Mo.Const. art. 1, § 19, which has been construed to apply "only where there has been an acquittal of the defendant by a jury." *Murray* v. *State,* 475 S.W.2d 67, 70 (Mo. 1972); *Kansas City* v. *Henderson,* 468 S.W.2d 48, 52 (Mo. 1971), *cert. denied,* 404 U.S. 1004, 92 S.Ct. 570, 30 L.Ed.2d 557 (1971). *See Sours* v. *State,* 593 S.W.2d 208, 210 (Mo. banc 1980).

14, 218-21 (Mo. banc 1980), and we would incorporate that analysis by reference into our opinion today, and reinstate the opinion originally published. The argument can be reduced to a simple syllogism:

(i) The double jeopardy clause of the fifth amendment to the United States Constitution prohibits the state from punishing a person twice for the same offense. *Benton* v. *Maryland,* 395 U.S. 784, 793-96, 89 S.Ct. 2056, 2061-63, 23 L.Ed.2d 707 (1969); *North Carolina* v. *Pearce,* 395, U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969); *State* v. *Neal,* 514 S.W.2d 544, 548 (Mo. banc 1974); *State* v. *Parsons,* 513 S.W.2d 430, 437 38 (Mo.1974).

(ii) Armed criminal action and the underlying felony used to prove armed criminal action—in this case, robbery first degree—are the same offense for double jeopardy purposes under the same evidence test, because it is not the case that proof of robbery requires proof of any fact not also required to prove armed criminal action. *Vitale* v. *United States,* ____ U.S. ____, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980); *Whalen* v. *United States,* 445 U.S. 684, 100 S.Ct. 1432, 1439, 63 L.Ed.2d 715 (1980); *Simpson* v. *United States,* 435 U.S. 6, 11, 98 S.Ct. 909, 912, 55 L.Ed.2d 70 (1978); *Brown* v. *Ohio,* 432 U.S. 161, 166, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977); *Jeffers* v. *United States,* 432 U.S. 137, 151, 97 S.Ct. 2207, 2216, 53 L.Ed.2d 168 (1977); *Iannelli* v. *United States,* 420 U.S. 770, 785 n. 17, 95 S.Ct. 1284, 1293-1294 n. 17, 43 L.Ed.2d 616 (1975); *Harris* v. *United States,* 359 U.S. 19, 23-24, 79 S.Ct. 560, 564, 3 L.Ed. 2d 597 (1959); *Gore* v. *United States,* 357 U.S. 386, 388-91, 78 S.Ct. 1280, 1282-1283, 2 L.Ed.2d 564 (1958); *Blockburger* v. *United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932); *Carter*

v. *McClaughry*, 183 U.S. 365, 394-95, 398, 22 S.Ct. 181, 46 L.Ed. 236 (1902); *Morey* v. *Commonwealth*, 108 Mass. 433, 434 (1871).

(iii) Therefore, the double jeopardy clause prohibits separately punishing a person both for armed criminal action and for the underlying felony.

We continue to find this argument persuasive.

We may note that *Whalen's* application of the *Blockburger* doctrine as a rule of statutory construction paralleled the application given *Blockburger* in our effort to resolve the constructional issue in *Sours*. Compare *Whalen*, 445 U.S. at 693, 100 S.Ct. at 1439, with *Sours*, 593 S.W.2d at 219. In *Sours*, we stated that if the underlying felony used to prove armed criminal action were a single named felony instead of a class of offenses, "it would be obvious that armed criminal action includes all of the elements of the felony specified." We observed that "the result is no different where the statute refers to 'any felony.'" 593 S.W.2d at 219. In *Whalen*, the Court concluded that "[a] conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape." 445 U.S. at 693, 100 S.Ct. at 1439. The Court rejected the government's contention that felony murder and rape were not the same offense under the same evidence test of *Blockburger*.

> The government contends that felony murder and rape are not the "same offense" under *Blockburger*, since the former offense does not in all cases require proof of a rape; that is, D.C.Code § 22-2401 proscribes the killing of another person in the course of committing rape *or* robbery *or* kidnapping *or* arson, etc. Where the offense to be proved does not include proof of a rape—for example, where the offense is a killing in the perpetration of a robbery—the offense is of course

> different from the offense of rape, and the Government is correct in believing that cumulative punishments for the felony murder and for a rape would be permitted under *Blockburger*. In the present case, however, proof of rape is a necessary element of proof of the felony murder, and we are unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense.
>
> There would be no question in this regard if Congress, instead of listing the six lesser included offenses in the alternative, had separately proscribed the six different species of felony murder under six statutory provisions. It is doubtful that Congress could have imagined that so formal a difference in drafting had any practical significance, and we ascribe none to it.

445 U.S. at 694, 100 S.Ct. at 1439.

The application of the same evidence test in *Sours* is also supported by the United States Supreme Court's holding in *Illinois* v. *Vitale*, ____ U.S. ____, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980), a multiple prosecution case. In *Vitale*, respondent, a juvenile was convicted of failing to reduce speed to avoid an accident, a violation of § 11-601(a) of the Illinois Vehicle Code. The charge arose out of an accident in which an automobile driven by respondent struck and fatally wounded two small children. Subsequently, a petition for adjudication of wardship was filed against respondent in the Circuit Court of Cook County, charging Vitale with two counts of involuntary manslaughter. The Illinois Supreme Court upheld the dismissal of the second proceeding on the ground that it was barred by the double jeopardy clause. *In re Vitale*, 71 Ill.2d 229, 16 Ill.Dec. 456, 375 N.E.2d 87 (1978). The United States Supreme Court vacated the judgment and remanded the case for consid-

eration whether the judgment was based on state or federal grounds. 439 U.S. 974, 99 S.Ct. 554, 58 L.Ed.2d 645 (1978). The Illinois Supreme Court certified that the judgment was based on federal constitutional grounds, and the United States Supreme Court again granted certiorari. 444 U.S. 823, 100 S.Ct. 42, 62 L.Ed.2d 29 (1979). The Court reaffirmed the principle that the double jeopardy clause not only prohibits multiple prosecutions for the same offense but also protects against imposing multiple punishments for the same offense. ____ U.S. at ____, 100 S.Ct. at 2264. *Accord, Brown* v. *Ohio,* 432 U.S. 161, 165, 97 S.Ct. 2221, 2224, 53 L.Ed.2d 168 (1977); *North Carolina* v. *Pearce,* 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). The Court in *Vitale* also reaffirmed its holding in *Ha. ris* v. *Oklahoma,* 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977):

> In *Harris,* we held, without dissent, that a defendant's conviction for felony murder based on a killing in the course of an armed robbery barred a subsequent prosecution against the same defendant for the robbery. The Oklahoma felony murder statute on its face did not require proof of a robbery to establish felony murder; other felonies could underlie a felony-murder prosecution. But for the purposes of the Double Jeopardy Clause, we did not consider the crime generally described as felony murder as a separate offense distinct from its various elements. Rather, we treated a killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included offense. The State conceded that the robbery for which petitioner had been indicted was in fact the underlying felony, all elements of which had been proved in the murder prosecution. We held the subsequent robbery prosecution barred under the Double Jeopardy Clause, since under *In re Neilsen,* 131

> U.S. 176, 9 S.Ct. 672, 33 L.Ed. 118 (1889), a person who has been convicted of a crime having several elements included in it may not subsequently be tried for a lesser-included offense—an offense consisting solely of one or more of the elements of the crime for which he has already been convicted. Under *Brown*, the reverse is also true; a conviction on a lesser-included offense bars subsequent trial on the greater offense.

___ U.S. at ___, 100 S.Ct. at 2267.

Despite the Illinois Supreme Court's assertion in *Vitale* that "the lesser offense, failing to reduce speed, requires no proof beyond that which is necessary for conviction of the greater, involuntary manslaughter," and its conclusion that "the greater offense is by definition the 'same' as the lesser offense included within it," 71 Ill.2d at 239, 16 Ill.Dec. at 460, 375 N.E.2d at 91, the United States Supreme Court vacated the judgment and remanded the case for further proceedings "[b]ecause of our doubts about the relationship under Illinois law between the crimes of manslaughter and a careless failure to reduce speed to avoid an accident, and because the reckless act or acts the State will rely on to prove manslaughter are still unknown." ___ U.S. at ___, 100 S.Ct. at 2267.

[5] We are here forced to address the constitutional issue expressly reserved in *Whalen*, 445 U.S. at 690, 100 S.Ct. at 1435, 1437; *Simpson*, 435 U.S. at 11, 98 S.Ct. at 912; and *Iannelli*, 420 U.S. at 785-86 nn. 17-18, 95 S.Ct. 1293-94 nn. 17-18. *See Jeffers*, 432 U.S. at 155, 97 S.Ct. at 218. We must conclude, for the reasons set forth in *Sours* v. *State*, 593 S.W.2d 208 (Mo. banc 1980), that the proof of the underlying felony-robbery first degree—does not require proof of a fact not also required to prove armed criminal action, or in other words, that proof of armed

criminal action necessarily proves every fact required to establish the underlying felony. Consequently, the two offenses are the "same offense" for double jeopardy purposes, *Vitale*, ____ U.S. at ____, 100 S.Ct. at 2266. *Whalen*, 445 U.S. at 694, 100 S.Ct. at 1439; *Harris*, 433 U.S. at 682, 97 S.Ct. at 2912; *Brown*, 432 U.S. at 167, 97 S.Ct. at 2226, and the double jeopardy clause prohibits the state from punishing appellant for both offenses. We believe that, because the double jeopardy clause prohibits punishing a person twice for the same offense, "the prosecution may not do in one trial what it is prohibited from doing in two trials." *Elmore* v. *State*, 382 N.E.2d 893, 894-95 (Ind. 1978). See cases that apply the rationale of *Harris* v. *Oklahoma* in the single prosecution context. *State* v. *Morgan*, 592 S.W.2d 796, 803 (Mo. banc 1980); *State* v. *Pinder*, 375 So.2d 836, 838 (Fla.1979); *Tyson* v. *State*, 386 N.E.2d 1185, 1193 (Ind.1979); *Mitchell* v. *State*, 382 N.E.2d 932, 934 (Ind. 1978); *Elmore* v. *State*, 382 N.E.2d 893, 894 95 (Ind.1978); *State* v. *Frye*, 283 Md. 709, 393 A.2d 1372, 1375 (1978); *Briggs* v. *State*, 573 S.W.2d 157, 159 (Tenn.1978). *See also State* v. *Neal*, 514 S.W.2d 544, 548 (Mo. banc 1974); *State* v. *Parsons*, 513 S.W.2d 430, 438 (Mo.1974).

If the vacation of our prior judgment and the remand of the case for reconsideration in light of *Whalen* was intended to lead this Court to adopt the view that the General Assembly is free to impose separate punishments for two crimes that constitute the same offense under the traditional same evidence test, we are unable to so read *Whalen* and we are not prepared to take that step. We believe that the United States Supreme Court has heretofore reserved that question as noted above. We believe that such a ruling would abolish the traditional double jeopardy protection against multiple punishments for the same offense. It would require bifurcation of the meaning of "same offense" under the double jeopardy clause. It would grant to the state

legislature the power to define the meaning of "same offense" as used in the double jeopardy clause of the Constitution, a traditional judicial function. The implicit effect of such a holding would be that the double jeopardy clause would hereafter be only a limitation on the executive and judicial branches, but not on the legislative branch of government. We do not believe that it is appropriate for this Court to make such a ruling. If such a ruling is to be made, it is the responsibility of the United States Supreme Court to make it.

After thorough examination of the opinions in *Whalen* v. *United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), we have concluded that our original opinion and judgment in *Sours* v. *State*, 593 S.W.2d 208 (Mo. banc 1980), was correct and should be reinstated as supplemented by our opinion today. We reverse the judgment of the trial court insofar as it denied appellant relief from his conviction for armed criminal action, and vacate and set aside that conviction. We affirm the judgment of the trial court insofar as it denied appellant relief from his conviction for robbery first degree.

BARDGETT, C. J., and SEILER, MORGAN and HIGGINS, JJ., concur.

DONNELLY, J., dissents in separate dissenting opinion filed.

RENDLEN, J., dissents in separate dissenting opinion filed and concurs in dissenting opinion of DONNELLY, J.

DONNELLY, Judge, dissenting.

In *Benton* v. *Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), the United States Supreme Court overruled *Palko* v. *Connecticut*, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937) and applied the Double Jeopardy Clause of the United States Constitution to the states.

In *Sours* v. *State,* 593 S.W.2d 208 (Mo. banc 1980), a majority of this Court ordered a conviction under Missouri's armed criminal action statute set aside because it felt compelled to do so by general declarations of law made in *Harris* v. *Oklahoma,* 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977).

On May 27, 1980, in *Missouri* v. *Sours,* ____ U.S. ____, 100 S.Ct. 2935, 64 L.Ed.2d 820, the United States Supreme Court vacated the judgment of this Court in *Sours,* and remanded the case to this Court "for further consideration in light of *Whalen* v. *United States,* 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980)."

Of course, the mandate of May 27, 1980, is the law of the case and is binding on this Court.

In *North Carolina* v. *Pearce,* 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969), the United States Supreme Court stated "that the Fifth Amendment guarantee against double jeopardy * * * has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense. * * *."

I agree with the conclusion of the principal opinion that the Missouri General Assembly intended that two separate punishments be imposed for first degree robbery and armed criminal action. I do not agree that the holdings in *Harris* and *Vitale,* both *second prosecution* cases, are pertinent to this *multiple punishments* case. *See State* v. *Neal,* 514 S.W.2d 544, 550, 551 (Mo. banc 1974) (Donnelly, C. J., concurring). *See also* Rules 23.05 and 24.07.

The essential question is: should this Court apply the holdings of *Harris* and *Vitale,* both *second prosecution*

cases, in this *multiple punishments* case when we know that the United States Supreme Court declined the opportunity to apply the *Harris* holding in *Simpson* v. *United States,* 435 U.S. 6, 12, 98 S.Ct. 909, 913, 55 L.Ed.2d 70 (1978), also a *multiple punishments* case? I think not. In *Oregon* v. *Hass,* 420 U.S. 714, 719, 95 S.Ct. 1215, 1219, 43 L.Ed.2d 570 (1975), the Court stated that "a State may not impose * * * greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." *See also North Carolina* v. *Butler,* 441 U.S. 369, 376, 99 S.Ct. 1755, 1759, 60 L.Ed.2d 286 (1979).

In my view, the logic of *Whalen* is that the *multiple punishments* proscription of *Pearce* is satisfied if the *multiple punishments* in this case were intended and authorized by the General Assembly—to hold otherwise is to make the mandate of May 27, 1980, inscrutable.

I respectfully dissent.

RENDLEN, Judge, dissenting.

INTRODUCTION

I respectfully dissent. The majority's mechanical treatment of *Blockburger* v. *United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), "same offense" test as substantive double jeopardy doctrine is in my view a misapplication of that test and an exaltation of form over substance. The principal opinion decides the double jeopardy clause forbids conviction and punishment in a *single prosecution* for armed criminal action and robbery under *Blockburger.* The majority does so against a tapestry of dicta woven largely from *successive prosecution* cases and by skillful conversion of the canon for "statutory construction" prescribed by *Blockburger,* into a rigid doctrine of constitutional right. The Supreme Court's mandate that on reconsideration we be guided by *Whalen* v. *United*

States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), neither so requires nor permits. In this regard the present effort is little more than a recasting of our original opinion vacated by the Court.

William Scott Sours was charged with robbery first degree by means of a dangerous and deadly weapon (§ 560.120, RSMo 1969 and § 560.135, RSMo Supp. 1975) and armed criminal action (§ 559.225, RSMo Supp. 1976) for participating in an armed robbery of a Mr. Quick Store in Jasper County. On October 5, 1977, Sours pled guilty to both charges and on January 5, 1978, was sentenced to five years imprisonment on the robbery conviction and three years imprisonment on the armed criminal action conviction, the sentences to run consecutively. See *Sours* v. *State,* 593 S.W.2d 208, 209-210 (Mo. banc 1980) (vacated ____ U.S. ____, 100 S.Ct. 2935, 64 L.Ed.2d 820 (1980)).

It should be noted at the outset that the majority fails to address the important question of whether Sours' guilty plea constituted "a break in the chain of events" so as to preclude litigation of the double jeopardy issue in this post—conviction Rule 27.26 proceeding. See *Tollett* v. *Henderson,* 411 U.S. 258, 267, 93 S.Ct. 1602, 1608, 36 L.Ed.2d 235 (1973); *Francis* v. *Henderson,* 425 U.S. 536, 541-542, 96 S.Ct. 1708, 1711, 48 L.Ed.2d 149 (1976); *Wainwright* v. *Sykes,* 433 U.S. 72, 86-87, 97 S.Ct. 2497, 2506, 53 L.Ed.2d 594 (1977). Cf. *Jeffers* v. *United States,* 432 U.S. 137, 152, 97 S.Ct. 2207, 2216, 53 L.Ed.2d 168 (1977). Recently in *Weir* v. *State,* 589 S.W.2d 256 (Mo. banc 1979), this Court questioned the cognizability of a claim of double jeopardy in a Rule 27.26 proceeding following defendant's failure to raise the objection at the trial level. The majority fails to consider the rule announced by *Weir,* at 258:

> [I]t is now settled by numerous decisions in both the federal and state systems that where there is a deliberate bypass, whether for strategic, tactical, or other reasons, of orderly state procedure, a movant is precluded from raising a constitutional issue on a post conviction motion.

Instead of eagerly seizing the constitutional issue, we should remand for a determination by the sentencing court whether Sours by pleading guilty has deliberately bypassed orderly state procedures[1] and only after a determination that he has not, should we address the far reaching federal constitutional question.

Turning to the constitutional issue, it was the farmers' intent[2] that the Fifth Amendment embody the common law's double jeopardy protection against a defendant's *reprosecution* following conviction or acquittal upon a criminal charge.[3] See *Brown* v. *Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977); *United States* v. *Wilson*, 420 U.S. 332, 340-342, 95 S.Ct. 1013, 1020-1021, 43 L.Ed.2d 232 (1975). James Madison tendered the original

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[1]The "deliberate bypass" standard employed by our courts in determining whether constitutional issues improperly preserved at trial may be raised in post conviction proceedings is similar to the "cause and prejudice" standard employed in the federal system for making determination in habeas proceedings. *Wainwright* v. *Sykes*, 433 U.S. 72, 95 n.1, 97 S.Ct. 2497, 2500 n.1, 53 L.Ed.2d 594 (1977) (Stevens, J., concurring).

[2]For a discussion of the historical development of the concept of double jeopardy see *Bartkus* v. *Illinois*, 359 U.S. 121, 151 155, 79 S.Ct. 676, 695 697, 3 L.Ed.2d 684 (1959) (dissenting opinion of Justice Black).

[3]At common law double jeopardy was in the nature of a plea of abatement. The technical plea was either autrefoits acquit or autrefoits convict. See 2 Hawkins, Pleas of the Crown, 522 537 (6th ed. 1777). Either plea was an absolute bar to a *subsequent* prosecution as "the party ought not to be brought twice into danger of his life for the same crime." *Id.* at 534.

draft of the Fifth Amendment,[4] later amended to its present form, midst concern that a defendant's right to new trial not be abridged by a conviction erroneously obtained. See *Wilson, id.* citing I Annals of Congress 753 (1789). At the time of adoption the limited number of common law felonies, e. g., rape, robbery, murder, arson and burglary allowed for ready application and more certain protection for criminal defendants under the double jeopardy clause. Today, given the proliferation of complex statutory crimes, it is recognized that the doctrine's original scope cannot provide complete and certain answers in many cases. Nevertheless in the constitutional construction process, we are guided by the purposes and policies underlying the constitutional protections afforded by the farmers and those who ratified our Bill of Rights.

The fountainhead of that aspect of double jeopardy jurisprudence described as the double punishment doctrine appears to be *Ex parte Lange,* 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1873). There the sentencing court exceeded the legislative authorization for punishment of a statutory crime. Defendant was convicted of stealing post office property for which the statutes provided as punishment, imprisonment for not more than one year *or* a fine of $10 to $200. The court however sentenced Lange to one year's imprisonment *and* a fine of $200. It was in that context of the trial court having exceeded its statutory authority that the double punishment doctrine had its origins. On review, the Court was concerned with the trial court having exceeded the legislative authorization *not* the legislature's constitutional authority to proscribe certain acts as crimes and prescribe punishment therefore. The Court at 176 stated:

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[4]The original proposal would have protected a defendant from "more than one punishment or one trial for the same offense . . .". *United States* v. *Wilson,* 420 U.S. 332, 341, 95 S.Ct. 1013, 1021, 43 L.Ed.2d 232 (1975), citing 1 Annals of Congress 434 (1789).

> We are of opinion that when the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments *to which alone the law subjected him,* the power of the court to punish further was gone. That the principle we have discussed then interposed its shield, and forbid that he should be punished again for that offense. (Emphasis added.)

Whalen v. *United States,* 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), which guides us here, emphasized that the decision in terms of "double punishment" turns on the legislative intent, stating that "the *dispositive* question, therefore, is whether Congress did so provide." 445 U.S. at 688, 100 S.Ct. 1432 at 1436, 63 L.Ed.2d at 722.

The double punishment doctrine does not constitute a substantive limitation on the legislature's power to define and punish crimes. See *Whalen* v. *United States,* 445 U.S. 695 696, 100 S.Ct. 1432, 1440, 63 L.Ed.2d 715, 726 (1980) (concurring opinion of White, J.); 445 U.S. 696-699, 100 S.Ct. 1432, 1440, 63 L.Ed.2d 715, 726 (concurring opinion of Blackmun, J.) Western and Drubel, Towards A General Theory of Double Jeopardy, Sup.Ct.Rev. 81, 112-115 (1978). See also Note "Twice in Jeopardy" 75 Yale L.J. 262, 311-313 (1965). The Court in *Whalen* addressed the multiple punishment issue in terms of whether the judicial action had exceeded the legislative authorization. After a discussion of *Lange,* which as noted above can best be described as a legislative authorization case, the Court held, "[t]he Double Jeopardy Clause at the very least precludes federal courts from imposing consecutive sentences unless authorized by Congress to do so. The Fifth Amendment guarantee against double jeopardy embodies in this respect simply one aspect of the basic principal that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found

guilty of them, resides wholly with the Congress." *Whalen*, 445 U.S. 684, 689, 100 S.Ct. 1432, 1436, 63 L.Ed.2d 715, 722 (1980).

The reason for this conclusion seems self apparent. To say that the legislature can punish crime X by life imprisonment but that it cannot define certain acts as crime X^1 punishable by five years to life and crime X^2 punishable by three years to life respectively, employs as intellectual artifice providing the criminal defendant little or no additional protection. The majority holds that under the then applicable statutes a defendant could be convicted of armed robbery punishable by five years to life or of armed criminal action and sentenced to three years to life,[5]

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[5]Section 560.135, RSMo 1969, provided that a person convicted of robbery in the first degree by means of a dangerous and deadly weapon could be sentenced to death or imprisonment ranging from a minimum of 5 years to life. Those convicted of robbery in the first degree could be sentenced only to imprisonment ranging from a minimum of 5 years to life. *Id.* Subsequently in 1975 the legislature amended the statute and provided that the punishment for both robbery in the first degree and robbery in the first degree by means of a dangerous and deadly weapon would be imprisonment ranging from a minimum of 5 years to a life term. § 560.135, RSMo Supp. 1975.

Section 559.225, RSMo Supp. 1976 provides:

> 1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.
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> 2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than five years. The punishment imposed

(Continued on next page)

but could not be convicted of both in the same proceeding and if so convicted the armed criminal action conviction must be vacated. (One might ask, why the armed criminal action conviction?) The principal opinion skirts the Double Jeopardy Clause's historical purpose to protect the defendant from harassment, relitigation, and judicial usurpation of the legislative authority to punish. See Note, Twice in Jeopardy, 75 Yale L.J., 262, 266-267 (1965). Instead the majority seeks to transform the provision protecting against double punishment into a diluted analogue of the Eighth Amendment without measurably enhancing the defendant's protections as shown above.[6] Though the Eighth

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Footnote continued

pursuant to this subsection shall be in addition to any punishment provided by law for the crime committee [sic] by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of five calendar years.

3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than ten years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of ten calendar years.

4. The provisions of this section shall not apply to the felonies defined in sections 559.005, 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo.

[6]It is true that conviction of both robbery in the first degree and armed criminal action will affect a prisoner's eligibility for parole. See Rules and Regulations Governing the Granting of Paroles, Conditional Releases, and Related Procedures, Missouri Board of Probation and Parole, pp. 8 10 (1979). However such delay in parole eligibility would be present upon a conviction for armed criminal action alone. *Id.*, § 559.225, RSMo Supp. 1976. The mere fact that multiple convictions occur and consecutive sentences are imposed does not alter eligibility for parole in

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Amendment remains a vital and essential safeguard against excessive punishment by the legislature (see *Coker* v. *Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 2866, 53 L.Ed.2d 982 (1977); *State* v. *Higgins*, 592 S.W.2d 151 (Mo. banc 1979), appeal dismissed 446 U.S. 902, 100 S.Ct. 1825, 64 L.Ed.2d 254 (1980), redesigning the Fifth Amendment to serve the purpose filled by the Eighth serves no legitimate function[7] and violates the canons of orderly constitutional construction.

The only apparent justification for the majority's manipulation of the double punishment doctrine is to guard against prosecutorial and judicial arbitrariness. A constitutional issue of some dimension would be presented if the statutory pattern allowed random and capricious results in which some defendants were convicted of one of the constituent crimes and others convicted of both without any ascertainable justification. Such is not the case under our statutes. The legislature, as recognized by the majority, clearly intended that a person committing a felony with a firearm be convicted and punished for both the underlying felony and armed criminal action. "Any person who commits any felony under the laws of this State by, with, or through the use, assistance, or aid of a dangerous or deadly weapon *is also guilty of the crime of armed*

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any way. Rules and Regulations Governing the Granting of Paroles, Conditional Releases, and Related Procedures, Missouri Board of Probation and Parole, pp. 11 12 (1979).

[7]This Court has held that punishment enhancement schemes which impose additional liability upon conviction of a crime if certain facts are shown to exist (i.e., previous convictions) are not violative of double jeopardy. See § 556.280, RSMo 1969 (repealed); § 558.016, RSMo 1978; *State* v. *Johnstone*, 335 S.W.2d 199, 204 (Mo. 1960), *cert. denied*, 364 U.S. 842, 81 S.Ct. 81, 5 L.Ed.2d 66 (1960). It is difficult to perceive a functional difference between a sentence enhancement scheme and the "armed criminal action first degree robbery consecutive punishment plan" the majority now holds is forbidden by the Fifth Amendment to the United States Constitution.

Criminal action . . . . The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon." Section 559.225, RSMo Supp. 1976. The uncertainty as to legislative intent in *Whalen* is not present here. Further, it was noted there that "[t]he Double Jeopardy Clause at the very least precludes federal courts from imposing consecutive sentences unless authorized by Congress to do so." *Whalen*, 445 U.S. 684, 689, 100 S.Ct. 1432, 1436, 63 L.Ed.2d 715, 722 (1980). The penalties imposed here were explicitly provided by the legislature. The problem of ambiguity for which the rule of lenity provides an important safeguard against prosecutorial and judicial arbitrariness, simply is not present. In sum, when the legislative intent that an act be punished as two crimes is clear, the potential for arbitrariness by prosecutors and judges is de minimus. As a result, no issue of constitutional dimension arises under the Fifth Amendment by the operation of our Missouri armed criminal action statute.

An examination of earlier United States Supreme Court opinions and recent summary actions by that Court points up the validity of our Missouri armed criminal action scheme under which a person who commits a felony with a dangerous and deadly weapon may be found guilty of two offenses, armed criminal action and the underlying felony. In *Jeffers* v. *United States*, 432 U.S. 137, 147-150, 97 S.Ct. 2207, 2214-15, 53 L.Ed.2d 168 (1977), the Court assumed arguendo, that 18 U.S.C. 846 (conspiracy to distribute heroin) was a lesser included offense of 18 U.S.C. 848 (conducting an enterprise to distribute heroin), and held that a defendant convicted of 846 in a prior proceeding had no double jeopardy claim in respect to a later 848 prosecution because the defendant had earlier successfully moved to sever the charges. A fortiori, it may be said

that Jeffers, who was tried and convicted in two proceedings for two offenses, one of which the Court assumed to be a lesser included offense, could have been tried for both in a single proceeding and so it is with Sours.

The majority's reliance on *Harris* v. *Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977) and *Brown* v. *Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), is misplaced. First, *Harris* and *Brown* were successive prosecution cases involving the serious risks of vexation and harassment to criminal defendants attendant in multiple prosecutions. Further, the precise issue presented here was specifically reserved by the Court in *Simpson* v. *United States*, 435 U.S. 6, 11-12, 98 S.Ct. 909, 912-913, 55 L.Ed.2d 70 (1978), decided some eight months following *Harris*, which teaches that *Harris* was not, as asserted by the majority, dispositive of the issue here. I might add that the mandate of the Court in *Sours* does not direct us to decide this case "in the light of *Harris* v. *Oklahoma*." *Harris* merely held that a defendant's conviction of felony murder based on a killing in the course of any armed robbery barred a *subsequent* prosecution against that same defendant for robbery. *Harris* v. *Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977). *Brown* decided only that once a defendant was convicted of misdemeanor joyriding, the State was barred by double jeopardy from convicting the defendant of the greater included offense of felony auto theft in a *subsequent* prosecution "[T]he Fifth Amendment forbids *successive* prosecution and cumulative punishment for a greater and lesser included offense," (Emphasis added), *Brown* v. *Ohio*, 432 U.S. 161 at 169, 97 S.Ct. at 2227 (1977). Indeed the Court in *Brown* reiterated 432 U.S. at 165, 97 S.Ct. at 2225 the freedom of the legislature to proscribe criminal conduct and prescribe punishment.

> [T]he Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and

prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial. *Brown* v. *Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225.

Not only does the majority disregard the Court's consistent concern in decisions from *Lange* to *Whalen* with the scope of legislative authorization as to double punishment claims, it also fails to recognize that the defendant's interest in finality, the core value furthered by the Double Jeopardy Clause, is not implicated in unitary prosecution cases. The prime consideration in this unitary prosecution case is the legislative objective of deterring violent offenders by increasing penalties for felonies committed with a weapon.[8] The principal opinion effectively thwarts that objective.

The majority fails to discuss the recent action of the Court on a nearly identical issue dismissing an appeal for want of a substantial federal question. The Court dismissed the appeal from a Michigan Supreme Court decision holding that consecutive punishment does not violate the federal constitution's Fifth Amendment. *Wayne County Prosecutor* v. *Recorder's Court Judge* and *People* v. *Brintley*, 406 Mich. 374, 280 N.W.2d 793 (Mich.1979) appeal dismissed sub nom. *Brintley* v. *Michigan*, 444 U.S. 948,

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[8]At the time of the enactment of the armed criminal action statute law enforcement authorities initiated a publicity campaign warning "use a gun, go to prison." Whether the armed criminal action statute sub judice furthered these important goals is a matter for legislative determination. Fixing punishment for crimes defined by statute is the province of the legislature, not the courts. *State* v. *Alexander*, 315 Mo. 199, 285 S.W. 984, 985 (1926); *State* v. *Higgins*, 592 S.W.2d 151 (Mo. banc 1979), appeal dismissed, 446 U.S. 902, 100 S.Ct. 1825, 64 L.Ed.2d 254 (1980).

100 S.Ct. 418, 62 L.Ed.2d 317 (1979). There, the Michigan Supreme Court addressed the constitutionality of convictions under a Michigan statute (similar to the Missouri armed criminal action statute) providing that a felony committed by a person with a firearm constituted an additional offense, for which one convicted was to be punished consecutively to the sentence imposed on the underlying felony. Defendant contended his convictions violated rights protected by the Fifth Amendment. See MCLA 750.227b(b);[8] *Id.* at 794. The Michigan Court, in a persuasive and comprehensive opinion dealing with the precise question here presented, held that by enacting the felony-firearm statute the legislature created a separate crime distinct from the underlying felony and intended that consecutive punishments be imposed. *Brintley,* 280 N.W.2d 793 at 795-796. In one of the cases involved in that consolidated appeal, *People* v. *Brintley,* the court firmly concluded that conviction of both felony firearm and armed robbery offenses

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[8]MCLA 750.227b provides:

(1) A person who carries or has in his possession a firearm at the time he commits or attempts to commit a felony, except the violation of section 227 or section 227a, is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this section, the person shall be imprisoned for 10 years.

(2) The term of imprisonment prescribed by this section shall be in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

(3) The term of imprisonment imposed under this section shall not be suspended. The person subject to the sentence mandated by this section shall not be eligible for parole or probation during the mandatory term imposed pursuant to subsection (1).

As is readily apparent from the face of the statute, it is indistinguishable in all important details from the Missouri armed criminal action statute. See n.8 *supra.*

(described as the "same offense" under the majority opinion here) was not violative of the federal constitution's protection against double jeopardy. *Id.* at 799-800. Of prime importance here, the United States Supreme Court dismissed the appeal from that judgment "for want of substantial federal question." 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317. The Court's refusal to disturb the conclusion of the Michigan Supreme Court that conviction of both felony-firearm and armed robbery in a single proceeding did not violate the Fifth Amendment's prescription has precedential value as a disposition on the merits. See *Hicks* v. *Miranda*, 422 U.S. 332, 344-345, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975). We are bound to follow that summary decision under the command of the Supremacy Clause as to all federal questions. Art. VI, § 2, United States Constitution. As recently explained by the United States Supreme Court, "[s]ummary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appeal from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel* v. *Bradley*, 432 U.S. 173 at 176, 97 S.Ct. 2238 at 2240 (1977). Here the majority has reached a decision diametrically opposed to the conclusion reached in *Brintley* and seems unconcerned that the appeal was dismissed by the Supreme Court for want of a substantial federal question. In the jurisdictional statement to the appeal filed by Brintley, a claim was made that conviction of both felony-firearm and armed robbery violated the double jeopardy doctrine.[10] The Su-

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[10]In the jurisdictional statement filed on October 15, 1979, in *Brintley* v. *Michigan*, No. 79 5506, appeal dismissed, 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1980), Brintley's counsel argued that conviction and consecutive punishment in one proceeding for armed robbery

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preme Court necessarily rejected that claim when it dismissed the appeal. Yet the majority ignores or overlooks *Brintley* and decides the same issue on federal constitutional grounds. While such action is defensible in the context of adjudication of state constitutional provisions, it does not square with the command of the Supremacy Clause and the role of state courts in the federal system when federal questions are presented.

Neither do subsequent doctrinal development justify the majority's disregard of the Court's summary action in *Brintley*. As previously noted in *Whalen*, the Court's most recent pronouncement, the constitutional issue was discussed in terms of whether the punishment imposed exceeds the legislative authorization. Having determined

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and felony firearm under MCLA 750.227b constituted double jeopardy as multiple punishment. The argument headings contained in the statement of jurisdiction spell out this claim. "I. THE DOUBLE JEOPARDY CLAUSE IS A SUBSTANTIVE LIMITATION ON THE MICHIGAN LEGISLATURE." Appellant's Statement of Jurisdiction, page 8. "II. THE VIOLATION OF § 750.227b ALLEGED IN COURT II OF EACH INFORMATION REQUIRED PROOF OF ALL ELEMENTS CONTAINED IN COUNT I, AND THUS THE OFFENSES WERE THE SAME FOR DOUBLE JEOPARDY PURPOSES." Appellant's Statement of Jurisdiction, page 11. "III. CONVICTION UNDER § 750.227b REQUIRES PROOF OF A SPECIFIC FELONY." Appellant's Statement of Jurisdiction, page 12. "IV. MR. BRINTLEY'S SENTENCE HAS BEEN TWICE AUGMENTED UNDER TWO STATUTES WHICH ARE THE SAME FOR DOUBLE JEOPARDY PURPOSES." Appellant's Statement of Jurisdiction, page 15. "V. THE DOUBLE JEOPARDY CLAUSE BARS MULTIPLE CONVICTIONS ARISING FROM A SINGLE ACT OCCURRING AT ONE PLACE, AT ONE TIME, AND FOR ONE PURPOSE." Appellant's Statement of Jurisdiction, page 16. The Supreme Court necessarily rejected all these contentions in respect to MCLA 750.227b virtually identical in its consecutive punishment scheme to § 559.225, RSMo Supp. 1976. Such rejection is of precedential value in this case and we are bound to follow it. *Hicks* v. *Miranda*, 422 U.S. 332, 344, 345, 95 S.Ct. 2281, 2289, 2290, 45 L.Ed.2d 223 (1975).

Congress did not intend consecutive punishments by enacting D.C.Code 23-112, the Court stated, "Congress is clearly free to fashion exceptions to the rule it chose to enact in § 23 112." *Whalen*, 445 U.S. 684, 695, 100 S.Ct. 1432, 1439, 63 L.Ed.2d 715, 725 (1980). We might add, if the Congress has such latitude, why not the Missouri General Assembly?

I conclude the majority opinion confers upon courts a role neither contemplated by those who ratified the Fifth Amendment nor supported by subsequent Supreme Court decisions interpreting it. As Justice Frankfurter analyzed a similar claim, "In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, these are peculiarly questions of legislative policy." Citations omitted. *Gore* v. *United States*, 357 U.S. 386 at 393, 78 S.Ct. 1280 at 1285, 2 L.Ed.2d 564 (1958). I submit the majority opinion in the name of double punishment doctrine invades the power of the legislature to define crimes and prescribe punishment. Accordingly, I must dissent.

Frank Conley, J., of robbery in first degree, and defendant appealed. The Court of Appeals, Shangler, J., held that: (1) evidence, including showing that alleged colloquy between defendant and companion in which defendant "discussed the matter with [companion] about making false statements to get her cut loose" could only have occurred by shouts through jail since defendant was held on first floor and companion was held on second floor, was sufficient to establish that defendant's confession was not improperly coerced by exploitation of desire to protect person held in close affection from rigor of prison; (2) denial of crime did not constitute implicit election of right to remain silent where defendant made officers fully aware

that he knew *Miranda* rights by heart; (3) confession was not improper exploitation of illegal arrest where evidence showed no purposefulness of arrest by Iowa officers other than for Iowa burglary, and Missouri officers, to whom defendant confessed as to Missouri crimes, were unaware that the arrest was made without warrant or probable cause; and (4) there was no error in refusing tender by defendant of submission on stealing.

Affirmed.

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI,
Respondent,

vs.

ROBERT LEE HAGGARD,
Appellant.

No. 62227

OPINION CONCURRING IN PART AND DISSENTING IN PART

I join the majority in its affirmance of defendant's conviction (sentence 15 years) for robbery in the first degree on Count I. However, I cannot concur in the reversal of the armed criminal action conviction, under Count II (sentence 15 years) because that reversal stems from the majority's adamant refusal to follow the controlling law, most recently announced by the United States Supreme Court in *Albernaz* v. *United States,* 450 U.S. ____, 49 U.S.L.W. 4237 (March 9, 1981). The case at bar is but another of those in which Missouri juries have, in single trials on separate counts convicted defendants of robberies (or other statutory crimes), and on armed criminal action charges under § 559.225, RSMo Supp. 1976 (now § 571.015, RSMo 1978).

This court mistakenly holds the double jeopardy proscription of the Fifth Amendment to the United States Constitution requires reversal of the armed criminal action convictions in those cases. The majority launched this course in *Sours* v. *State,* 593 S.W.2d 208 (Mo. banc Jan-

uary 15, 1980) (*Sours I*), and anchored its position in *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc August 8, 1980) (*Sours II*). The three districts of our Court of Appeals, have been confronted by a surprisingly large number of such cases, and bound by this court's "Sours" decision, have reversed the armed criminal action convictions. As noted in the margin below,[1] between March 23 and June 22

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[1]To the Court of Appeals, Eastern District, the United States Supreme Court, in *Missouri* v. *Counselman*, ____ U.S. ____ (1981) (No. 80-754, decided March 23, 1981), vacated and remanded "for further consideration in light of *Albernaz* v. *United States*, 450 U.S. ____ (1981)," the following decisions rendered by that district: (1) *State* v. *White*, 610 S.W.2d 646 (Mo.App. 1980), affirming conviction of first degree robbery, but reversing armed criminal action judgment; (2) *State* v. *Williams*, 610 S.W.2d 644 (Mo.App. 1980), affirming judgments of assault with intent to rape with malice aforethought (together with carrying a concealed weapon), but reversing on armed criminal action; (3) *State* v. *Payne*, 607 S.W.2d 822 (Mo.App. 1980), affirming on first degree robbery and reversing on armed criminal action; (4) *State* v. *Counselman*, 603 S.W.2d 3 (Mo.App. 1980), again affirming the first degree robbery conviction and setting aside the armed criminal action conviction; and, (5) *State* v. *McGee*, 602 S.W.2d 709 (Mo.App. 1980), reversing and remanding the conviction for assault with intent to do great bodily harm without malice, as well as vacating the armed criminal action conviction. These causes were transferred for disposition in this court on June 2, 1981. Additionally, (6) *State* v. *Lowery*, 608 S.W.2d 445 (Mo.App. 1980), affirming the first degree robbery conviction but reversing on armed criminal action, was vacated and remanded by the United States Supreme Court to the Court of Appeals, Eastern District, with the above-quoted instruction. *Missouri* v. *Lowery*, ____ U.S. ____ (1981) (No. 80-1561, decided June 8, 1981). On June 22, 1981, the cause was transferred to be determined here. The Court's latest pronouncement occurred in *Missouri* v. *Crews*, ____ U.S. ____ (1981), (No. 80-1393, decided June 22, 1981), where the Court vacated and remanded to the Eastern District four additional cases with instructions to reexamine in the light of *Albernaz*: (7) *State* v. *Crews*, 607 S.W.2d 759 (Mo.App. 1980), affirming robbery and kidnapping convictions and reversing on armed criminal action; (8) *State* v. *Crews*, 607 S.W.2d 729 (Mo.App. 1980), again affirming first degree robbery and kidnapping judgments, but reversing the armed criminal action conviction; (9) *State* v. *Helton*, 607 S.W.2d 772 (Mo.App. 1980), affirming the first degree

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of this year, the United States Supreme Court vacated judgments of reversal in 16 such cases, and in each instance remanded the cause "for further consideration in light of *Albernaz* v. *United States*, 450 U.S. ____ (1981)." In addition, the Court accepted for review three of our cases[2] in which armed criminal action convictions were set

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robbery conviction, yet reversing the armed criminal action judgment; and (10) *State* v. *Tunstall*, 607 S.W.2d 809 (Mo.App. 1980), affirming the pronouncement of guilt of attempted first degree robbery, but reversing the armed criminal action conviction. These causes were transferred on July 9, 1981, for disposition in this court.

The Supreme Court, on certiorari, vacated and remanded to the Court of Appeals, Western District, five cases, "for further consideration in light of *Albernaz* v. *United States*, 450 U.S. ____ (1981)." *Missouri* v. *Brown*, ____ U.S. ____ (1981) (No. 80-1368, decided March 30, 1981). The overturned decisions, transferred here on June 11, 1981, include: (11) *State* v. *Martin*, 610 S.W.2d 18 (Mo.App. 1980), affirming on first degree robbery and reversing on armed criminal action; (12) *State* v. *Greer*, 609 S.W.2d 423 (Mo.App. 1980), affirming kidnapping, as well as rape and sodomy convictions, but reversing the armed criminal action convictions; (13) *State* v. *Hawkins*, 608 S.W.2d 496 (Mo.App. 1980), affirming armed robbery judgment, but reversing on armed criminal action; (14) *Brown* v. *State*, 607 S.W.2d 801 (Mo.App. 1980), upholding, on a motion for post-conviction relief, the first degree robbery conviction, while vacating the armed criminal action conviction; and (15) *State* v. *Collins*, 607 S.W.2d 781 (Mo.App. 1980), again affirming on first degree robbery, but reversing armed criminal action conviction.

In *Missouri* v. *Sinclair*, ____ U.S. ____ (1981) (No. 80-1166, decided June 8, 1981), the Court vacated, remanding to the Court of Appeals, Southern District, "for further consideration in light of *Albernaz* v. *United States*, 450 U.S. ____ (1981)," (16) *State* v. *Sinclair*, 606 S.W.2d 271 (Mo.App. 1980), reversing an armed criminal action conviction, while affirming the second degree assault conviction. The cause was transferred on July 9, 1981, to this court for disposition.

[2]The United States Supreme Court issued its mandate to this court to reconsider three cases "in light of *Albernaz* v. *United States*, 450 U.S. ____ (1981)." *Missouri* v. *Greer*, ____ U.S. ____ (1981) (No. 80-997, decided May 26, 1981). The vacated cases were: (1) *State* v. *Williams*, 606 S.W.2d 777 (Mo. 1980) (Div. 1), affirming first degree robbery convictions and reversing on armed criminal action; (2) *State* v. *Kendrick*, 606 S.W.2d 643 (Mo. 1980) (Div. 2), again affirming on rob-

aside under the "Sours" notion of double jeopardy, and on May 26, 1981, directed they too be reconsidered in the light of *Albernaz*. The referenced cases remanded to our appellate courts were subsequently transferred here at our order, and though the mandates are directed to the respective appellate courts, they become the *sine qua non* to our actions thereon, as well as in the cases here on direct remand.

Haggard, the cause now before us on original appeal,

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bery first degree, but vacating the armed criminal action convictions; and, (3) *State* v. *Greer*, 605 S.W.2d 93 (Mo. 1980) (Div. 2), affirming the second degre murder conviction, but setting aside the armed criminal action judgment.

In addition to these cases on which the Supreme Court has taken action, there is pending in the Court a petition for certiorari filed by the State (bringing the total number of such petitions to 20) in response to a writ of habeas corpus issued by this court releasing Willie Williams. (*See*, Order of June 15, 1981, entered in *Williams* v. *Wyrick*, No. 62879). This court also issued opinions in three cases today reversing armed criminal action, relying on *Sours* and *Haggard*: (1) *State* v. *Fletcher*, ____ S.W.2d ____ (Mo. banc 1981) (No. 62049, decided July 14, 1981), affirming kidnapping, rape and robbery convictions, but vacating a life sentence for armed criminal action; (2) *State* v. *Gaskin*, ____ S.W.2d ____ (Mo. 1981) (Div. 2) (No. 61433, decided July 14, 1981), affirming a verdict of first degree robbery (together with assault with intent to kill with malice aforethought) and reversing the armed criminal action conviction; and (3) *State* v. *Pennington*, ____ S.W.2d ____ (1981) (Div. 2) (No. 61928, decided July 14, 1981), affirming a robbery first degree conviction, but reversing a guilty verdict of armed criminal action. Past reversals and vacations of sentences not challenged by petition for certiorari number approximately 40, including another inmate released by writ of habeas corpus. (It should be noted that permitting successful challenge by habeas corpus thwarts the mandate of *Wiglesworth* v. *Wyrick*, 531 S.W.2d 713 (Mo. banc 1976), that Rule 27.26 provide the exclusive method by which to attack the validity of a conviction.) These figures, of course, merely represent the tip of the iceberg. They only begin to reflect the total number of criminal cases affected by *Sours*, for they do not include prosecutions for crimes involving a weapon in which armed criminal action set aside by the trial court, all occurring after *Sours I*, January 15, 1980.

assumes the stance on the substantive issue as those in which our judgments have been vacated and hence, requires our application of the law under *Albernaz*. The essence of *Albernaz*, quite simply, is that the Legislature may authorize multiple punishments, and if so, imposition of such sentences is not violative of the double jeopardy provisions of the federal Constitution. The question is one of legislative intent, and because the majority concedes the Missouri Legislature *intended to impose punishment* for both crimes here involved, i.e., robbery and armed criminal action, the analysis should end and convictions on both counts be affirmed. However, the majority refuses to accept the clearly stated directive of the United States Supreme Court.

Our Legislature has provided for multiple punishment upon conviction of armed criminal action under § 559.225, RSMo Supp. 1976, and robbery in the first degree with a dangerous and deadly weapon, §§ 560.120, RSMo 1969, and 560.135, RSMo Supp. 1975, though commission of these crimes occur in the same transaction. In so doing, the Legislature has meticulously defined the crimes and prescribed the punishments, making clear its intent (as conceded by the majority) to convict and punish, within prescribed ranges, for each act. However, on January 15, 1980, in *Sours I*, a majority of this court, overturning our earlier decision in *State* v. *Treadway*, 558 S.W.2d 646 (Mo. banc 1977), *cert. denied*, 439 U.S. 838 (1978), and, invoking federal double jeopardy doctrine, declared impermissilbe the convictions for robbery and armed criminal action obtained in a single trial.[3]

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[3]It is of great interest that no statement of rationale was offered to explain how the majority selected the armed criminal action, vis a vis, the robbery conviction for reversal. One must ask, what theory of double jeopardy authorizes that result. This question, raised in my dissent in *Sours* v. *State*, 603 S.W.2d 592, 607 l.c. 610 (Mo. banc 1980) (*Sours*

(Continued on next page)

While *Sours I* was under consideration for review on certiorari, the Supreme Court decided *Whalen* v. *United States,* 445 U.S. 684 (1980), and addressing the "double punishment" issue, emphasized that "[t]he dispositive question, therefore, is whether Congress did so provide", *id.* at 689; i.e., did the Legislature intend to prescribe multiple punishment for the crimes charged; if so, the convictions may stand. As discussed in my dissent in *Sours II:*

> The double punishment doctrine does not constitute a substantive limitation on the legislature's power to define and punish crimes. See *Whalen* v. *United States,* 445 U.S. 695-696, 100 S.Ct. 1432, 1440, 63 L.Ed.2d 715, 726 (1980) (concurring opinion of White, J.); 445 U.S. 696-699, 100 S.Ct. 1432, 1440, 63 L.Ed.2d 715, 726 (concurring opinion of Blackmun, J.) Westen and Drubel, Towards A General Theory of Double Jeopardy, Sup. St. Rev. 81, 112-115 (1978). See also Note "Twice in Jeopardy" 75 Yale L. J. 262, 311-313 (1965). The Court in *Whalen* addressed the multiple punishment issue in terms of whether the judicial action had exceeded the legislative authorization. After a discussion of *Lange,* which as noted above can best be described as a legislative authorization case, the Court held, '[t]he Double Jeopardy Clause at the very least precludes federal courts from imposing consecu-

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Footnote continued

II), went unanswered by the majority there. Again, in the case *sub judice* a similar ad hoc choice is made by the majority without citation of authority or explication of rationale. This is but another of the flaws inherent in the majority's position, and made particularly apparent by today's decision in *State* v. *Fletcher*, ____ S.W.2d ____ (Mo. banc 1981) (No. 62049, decided July 14, 1981), where the majority vacated a life sentence for armed criminal action, and upheld 15 year sentences for rape and kidnapping and a 30 year sentence for robbery. The State might well have preferred vacation of one of the lesser sentences, yet the majority, with its apparent distaste for armed criminal action, makes this choice for the State.

> tive sentences unless authorized by Congress to do so. The Fifth Amendment guarantee against double jeopardy embodies in this respect simply one aspect of the basic principal that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress.' *Whalen*, 445 U.S. 684, 689, 100 S.Ct. 1432, 1436, 63 L.Ed.2d 715, 722 (1980).

Sours v. *State*, 603 S.W.2d 592, 607 at 609 (Mo. banc 1980).

Shrugging off the teaching of *Whalen* and the Court's mandate that our case be reconsidered in light of that decision, the majority, on August 18, 1980, in *Sours II*, reiterated its position, declaring that although the Missouri Legislature intended punishment for both crimes, it could not constitutionally so authorize, and convictions under both statutes constituted double jeopardy. Dissatisfied with this expression of indifference toward the holding of *Whalen*, the State again petitioned for certiorari, and during pendency of that proceeding, William Scott Sours was, on September 25, 1980, released from the Missouri State Penitentiary. This fact was relayed to the Court by brief of Sours' counsel[4] opposing issuance of the writ, and on January 26, 1981, the petition for certiorari in *Missouri* v. *Sours* (from *Sours II*) was denied, with the statement that "Justice Blackmun and Justice Rehnquist would dismiss the petition for a writ of certiorari as moot." *Missouri* v. *Sours*, ____ U.S. ____, 101 S.Ct. 953, 67 L.Ed.2d 118 (1981).

Less than two months later, on March 9, Justice Rehn-

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[4]A perusal of the brief reveals that mootness resulting from Sours' September release was a principal ground urged for denial of the State's petition.

quist delivering the opinion, the Court decided *Albernaz* v. *United States*, 450 U.S. ____, 49 U.S.L.W. 4237 (1981), affirming the United States Court of Appeals for the Fifth Circuit which had upheld petitioner's convictions and sentences and denied his claim of double jeopardy. The Court, by way of introduction to its incisive pellucid opinion, noted:

> We granted certiorari to consider whether Congress intended consecutive sentences to be imposed for the violation of these two conspiracy statutes and, if so, whether such cumulative punishment violates the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution.

450 U.S. at ____; 49 U.S.L.W. at 4238.

By its decision the Court, in its concluding paragraphs, removed any question as to its views on the matter, stating:

> Thus, the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishment, imposition of such sentences does not violate the Constitution.

450 U.S. at ____; 49 U.S.L.W. at 4240.

Immediately after this pronouncement, the Court commenced a succession of orders to Missouri's appellate courts beginning March 23rd, vacating judgments which had reversed armed criminal action convictions when accompanied with convictions of other crimes, and mandating further consideration in the light of *Albernaz*.

On May 12, 1981, the Supreme Court of Delaware, acting responsibly, followed the mandate of the Court under *Albernaz* in a case involving imposition of multiple sen-

tences for (1) first-degree assault, 11 *Del.C.* § 613(1), and (2) possession of a deadly weapon during the commission of a felony, 11 *Del.C.* § 1447. *Hunter* v. *State*, ____ A.2d ____ (Del. 1981) (No. 215, 1978, decided May 12, 1981) (*Hunter III*). The Delaware court had vacated the multiple sentences in *Hunter* v. *State*, 420 A.2d 119 (Del. 1980) (No. 215, 1978, decided March 14, 1980) (*Hunter I*), and had reaffirmed its position in light of *Whalen*, upon motion for reargument and clarification, in *Hunter* v. *State*, 420 A.2d 119, 127 (Del. 1980) (No. 215, 1978, decided June 24, 1980) (*Hunter II*). As in the similar Missouri cases, the United States Supreme Court granted certiorari, vacated the judgment and ordered the Delaware court to reconsider in the light of *Albernaz*. *Delaware* v. *Hunter*, 450 U.S. ____, 101 S.Ct. 1689, 68 L.Ed.2d 190 (1981). On May 12, 1981, the Delaware court responded with *Hunter III*, recognizing the clear import of *Albernaz* which it described as

> the emergence of the evolving rule stands unmistakably clear by virtue of the vote of 6 to 3, cast in the face of the flat contradiction of the concurring Justices, including the author of *Whalen*.
>
> Applying the rule of *Albernaz* to the instant case, we now hold that where the General Assembly intended, as we have found that it did in § 613(1) and § 1447, to impose multiple punishments for two offenses not satisfying the *Blockburger* test, imposition of two consecutive sentences by a court as a result of a single criminal trial does not violate the Double Jeopardy Clause of the Fifth Amendment.

(Footnote omitted). ____ A.2d at ____.

In sum, the Delaware court, recognizing "the rule of supremacy", correctly read and properly followed the "evolving rule" enunciated by the Court in *Albernaz*. It strains credulity how the majority here can do otherwise.

It serves little purpose to casually dismiss *Albernaz* as the majority has done with its unjustified characterization of the Delaware court's so-called "frustration". Under the Rule of Federal Supremacy, we are not permitted such cavalier evasion of the principles of *Whalen* and the mandate of *Albernaz*.

In a manner reminiscent of Quixana's Don Quixote de la Mancha's search for giants that became a comic tilt with windmills, the majority vainly seeks authority to justify its action by suggesting that the denial of certiorari in *Sours II* somehow condones its reversal of the armed criminal action conviction in contravention of the mandate of *Albernaz*. This language appears in the majority opinion:

> On January 26, 1981, the United States Supreme Court entered its order denying the petition of the state for certiorari in *Sours II*. Following the same reasoning expressed by the *Hunter* court, *a large majority of the Court* tacitly, if not in fact, *sustained our position* as stated in *Sours II*. Only Justices Blackmun and Rehnquist noted that they 'would dismiss the petition for a writ of certiorari as moot.' ____ U.S. at ____, 101 S.Ct. at 953, 67 L.Ed.2d at 118. (Emphasis added).

I submit it is pure conjecture to state that denial of certiorari in *Sours II* constitutes a manifestation of "the same reasoning expressed by the *Hunter* court," or that "a large majority of the Court tacitly, if not in fact, sustained our position as stated in *Sours II*." If the Court had intended the denial of certiorari attain the level of authority set by the majority here, it would not have vacated the judgments rendered in 16 of our Court of Appeals' decisions and in 3 of this court's decisions all bottomed on *Sours*, and in each instance, mandated reconsideration in the light of *Albernaz*. The Court did not

order us to reexamine these cases "in light of its denial of the petition for certiorari in *Sours II*", and yet, such is the attenuated position of the majority. Indeed, if the significance of denial of certiorari in *Sours* were as the majority describes, the 19 referenced judgments vacated and remanded to Missouri courts would not have been reviewed; instead, those petitions too would have been summarily denied.

Further, the majority ignores the long established rule that denial of review on certiorari neither imports a decision on the merits of the opinion below, nor forecloses subsequent consideration of the issues determined therein. *United States* v. *Kras*, 409 U.S. 434, 443 (1973); *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 365 n. 1 (1973); *United States* v. *Barnett*, 376 U.S. 681, 689 n.5 (1964). As stated in *Agoston* v. *Pennsylvania*, 340 U.S. 844 (1950), "denial of the petition seeking to bring here [on certiorari] the decision of the Supreme Court of Pennsylvania carries with it no support of the decision in that case, nor of any of the views in the opinion supporting it." *Id.* at 845. Hence, the majority's reliance on the denial of the petition for certiorari, for the proposition that the United States Supreme Court gave its blessing to this court's constitutional interpretation in *Sours I and II*, seems quite unjustified.

Finally, we have reached the point where this court must honor the "rule of supremacy" and gracefully accept the Supreme Court's interpretation of the organic law embodied in the Constitution of the United States. By refusing so to do, the majority would burden our Legislature with its view of so-called federal constitutional restraints contrary to those enunciated by the United States Supreme Court under the federal Constituion. In *Oregon* v. *Hass*, 420 U.S. 714 (1975), he Court stated, "a State may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically

refrains from imposing them." [emphasis in original] *Id.* at 719. The Oregon court's belief that it could "interpret the Fourth Amendment more restrictively than interpreted by the United States Supreme Court" was held "unsupported by any cited authority, is not the law and surely must be an inadvertent error; in any event, we reject it." *Id.* at 719, n. 4. This rule of supremacy was again asserted in *North Carolina* v. *Butler*, 441 U.S. 369 (1979), where in discussing a criminal accused's rights to counsel and to remain silent, the Court held that by creating an inflexible rule that no implicit waiver by the accused of such rights could ever suffice, the North Carolina Supreme Court had "gone beyond the requirements of federal organic law. It follows that its judgment cannot stand, since a state court can neither add to nor subtract from the mandates of the United States Constitution." *Id.* at 376. We too are required to abide the Court's interpretation of the United States Constitution, and may not burden our Legislature with federal constitutional notions contrary to the Court's mandate. Our duty is clear, yet the majority has avoided it, stating:

> Until such time as the Supreme Court of the United States declares clearly and unequivocally that the double jeopardy provision of the Fifth Amendment to the United States Constitution does not apply to the legislative branch of government, we cannot . . . enforce multiple punishments for same offense arising out of a single transaction.

Neither the Oregon court in *Hass* nor the North Carolina court in *Butler* were permitted to journey such an imperious path of noncomformance.

For these reasons, I dissent from that portion of the majority opinion reversing defendant's conviction for armed criminal action.

ALBERT L. RENDLEN, Judge

Clerk of the Supreme Court

STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102

THOMAS F. SIMON
Clerk

TELEPHONE
(314) 751-4144

July 29, 1981

Mr. Steven W. Garrett
Assist. Attorney General
P. O. Box 899
Jefferson City, MO 65102

In re: State of Missouri vs. Robert Lee Haggard No. 62227

Dear Mr. Garrett:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Respondent's Motion for rehearing overruled".

Very truly yours,

THOMAS F. SIMON
Clerk.

cc: Mr. Robert M. Liston

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. DONNIE L. COLLINS, *Appellant.*	No. 63148

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

Honorable James A. Moore, Judge

Reexamination on order of the United States Supreme Court

PER CURIAM:

This case together with several others[1] was ordered reexamined in light of Albernaz v. United States, 450 U.S. ____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). Since all of the courts of appeals rulings were based upon our rul-

[1]*See* State v. Counselman, 603 S.W.2d 3 (Mo.App. 1980); State v. McGee, 602 S.W.2d 709 (Mo.App. 1980); State v. Payne, 607 S.W.2d 822 (Mo.App. 1980); State v. White, 610 S.W.2d 646 (Mo.App. 1980); State v. (Johnny) Williams, 610 S.W.2d 644 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Counselman, ____ U.S. ____, 101 S.Ct. 1690, 68 L.Ed.2d 190 (March 23, 1981). *See* Brown v. State, 607 S.W.2d 801 (Mo.App. 1980); State v. Collins, 607 S.W.2d 781 (Mo.App. 1980); State v. Hawkins, 608 S.W.2d 496 (Mo.App. 1980); State v. (Eddie) Creer, 609 S.W.2d 423 (Mo.App. 1980); State v. Martin, 610 S.W.2d 18 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Western District, in Missouri v. Brown, ____ U.S. ____, 101 S.Ct. 1735, 68 L.Ed.2d 222 (March 30, 1981). *See* State v. Sinclair, 606 S.W.2d 271 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Southern District, in Missouri v. Sinclair, ____ U.S.

(Continued on next page)

ing in State v. Sours, 593 S.W.2d 208 (Mo. banc 1980) (Sours I) or State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), the cases were all ordered transferred to this Court. Our examination of the double jeopardy issue made in light of *Albernaz* pursuant to the orders of the United States Supreme Court, appears in State v. Haggard, ___ S.W.2d ___ (Mo. banc No. 62227), decided July 14, 1981.

The original opinion filed by the Missouri Court of Appeals, Western District, State v. Collins, 607 S.W.2d 781 (Mo.App. 1980), is approved and affirmed and by reference made a part of this opinion. State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), *cert. denied*, Missouri v. Sours, 101 S.Ct. 2935 (1981); and State v. Haggard, ___ S.W.2d ___, (Mo. banc No. 62227), decided July 14, 1981.

The armed criminal action conviction is reversed; first-degree robbery conviction is affirmed.

Donnelly, C.J., Seiler, Welliver, Morgan, Higgins, and Bardgett, J.J., concur; Rendlen, J., concurs in part and dissents in part in separate opinion filed.

Footnote continued

___, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. Lowery, 608 S.W.2d 445 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Lowery, ___ U.S. ___, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. (Timothy) Crews, 607 S.W.2d 759 (Mo.App. 1980); State v. (Terry) Crews, 607 S.W.2d 729 (Mo.App. 1980); State v. Helton, 607 S.W.2d 772 (Mo.App. 1980); State v. Tunstall, 607 S.W.2d 809 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District in Missouri v. Crews, ___ U.S. ___, 49 U.S.L.W. 3953 (June 22, 1981). In all of the above cases where an application for transfer to this Court was requested, all such applications were denied.

See State v. (Donald) Greer, 605 S.W.2d 93 (Mo. 1980); State v. Kendrick, 606 S.W.2d 643 (Mo. 1980); and State v. (Rollan Anthony) Williams, 606 S.W.2d 777 (Mo. 1980), all of which were vacated and remanded to this Court in Missouri v. Greer, ___ U.S. ___, 49 U.S.L.W. 3882 (May 26, 1981).

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. DONNIE L. COLLINS, *Appellant.*	No. 63148

OPINION CONCURRING IN PART AND DISSENTING IN PART

I join the majority in its affirmance of appellant's conviction for first degree robbery. However, I dissent to that portion of the majority opinion reversing appellant's conviction for armed criminal action for the same reasons set forth in my dissenting opinion in State v. Haggard, No. 62227, decided this date.

ALBERT L. RENDLEN, Judge

Clerk of the Supreme Court

STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102

THOMAS F. SIMON
Clerk

TELEPHONE
(314) 751-4144

July 29, 1981

Mr. Steven W. Garrett
Assist. Attorney General
P. O. Box 899
Jefferson City, MO 65102

In re: State of Missouri vs. Donnie L. Collins No. 63148

Dear Mr. Garrett:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Respondent's Motion for rehearing overruled".

Very truly yours,

THOMAS F. SIMON
Clerk.

cc: Mr. James Fletcher

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI,
Respondent,

vs.

Appellant.
STANLEY G. HELTON,

No. 63230

APPEAL FROM THE CIRCUIT COURT OF
MONTGOMERY COUNTY, MISSOURI

Honorable Edward D. Hodge, Judge

Reexamination on order of the
United States Supreme Court

PER CURIAM:

This case together with several others[1] was ordered reexamined in light of Albernaz v. United States, 450 U.S. ____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). Since all of the courts of appeals rulings were based upon our rul-

[1]*See* State v. Counselman, 603 S.W.2d 3 (Mo.App. 1980); State v. McGee, 602 S.W.2d 709 (Mo.App. 1980); State v. Payne, 607 S.W.2d 822 (Mo.App. 1980); State v. White, 610 S.W.2d 646 (Mo.App. 1980); State v. (Johnny) Williams, 610 S.W.2d 644 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Counselman, ____ U.S. ____, 101 S.Ct. 1690, 68 L.Ed.2d 190 (March 23, 1981). *See* Brown v. State, 607 S.W.2d 801 (Mo.App. 1980); State v. Collins, 607 S.W.2d 781 (Mo.App. 1980); State v. Hawkins, 608 S.W.2d 496 (Mo.App. 1980); State v. (Eddie)

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ing in State v. Sours, 593 S.W.2d 208 (Mo. banc 1980) (Sours I) or State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), the cases were all ordered transferred to this Court. Our examination of the double jeopardy issue made in light of *Albernaz* pursuant to the orders of the United States Supreme Court, appears in State v. Haggard, ____ S.W.2d ____ (Mo. banc No. 62227), decided July 14, 1981.

The original opinion filed by the Missouri Court of Appeals, Eastern District, State v. Helton, 607 S.W.2d 772 (Mo.App. 1980), is approved and affirmed and by reference made a part of this opinion. State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), *cert. denied*, Missouri v. Sours, 101 S.Ct. 2935 (1981); and State v. Haggard, ____ S.W.2d ____, (Mo. banc No. 62227), decided July 14, 1981.

Footnote continued

Greer, 609 S.W.2d 423 (Mo.App. 1980); State v. Martin, 610 S.W.2d 18 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Western District, in Missouri v. Brown, ____ U.S. ____, 101 S.Ct. 1735, 68 L.Ed.2d 222 (March 30, 1981). *See* State v. Sinclair, 606 S.W.2d 271 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Southern District, in Missouri v. Sinclair, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). See State v. Lowery, 608 S.W.2d 445 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Lowery, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. (Timothy) Crews, 607 S.W.2d 759 (Mo.App. 1980); State v. (Terry) Crews, 607 S.W.2d 729 (Mo.App. 1980); State v. Helton, 607 S.W.2d 772 (Mo.App. 1980); State v. Tunstall, 607 S.W.2d 809 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District in Missouri v. Crews, ____ U.S. ____, 49 U.S.L.W. 3953 (June 22, 1981). In all of the above cases where an application for transfer to this Court was requested, all such applications were denied.

See State v. (Donald) Greer, 605 S.W.2d 93 (Mo. 1980); State v. Kendrick, 606 S.W.2d 643 (Mo. 1980); and State v. (Rollan Anthony) Williams, 606 S.W.2d 777 (Mo. 1980), all of which were vacated and remanded to this Court in Missouri v. Greer, ____ U.S. ____, 49 U.S.L.W. 3882 (May 26, 1981).

That part of the judgment of the circuit court imposing a ten year sentence on defendant for armed criminal action is reversed. That part of the judgment imposing the fifteen year sentence for first degree robbery is affirmed.

Donnelly, C.J., Seiler, Welliver, Morgan, Higgins, and Bardgett, JJ. concur; Rendlen, J., concurs in part and dissents in part in separate opinion filed.

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI,
Respondent,

vs.

STANLEY G. HELTON,
Appellant.

No. 63230

OPINION CONCURRING IN PART AND DISSENTING IN PART

I join the majority in its affirmance of appellant's conviction for robbery in the first degree. However, I dissent to that portion of the majority opinion reversing appellant's conviction for armed criminal action for the same reasons set forth in my dissenting opinion in State v. Haggard, No. 62227, decided this date.

ALBERT L. RENDLEN, Judge

Clerk of the Supreme Court

STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102

THOMAS F. SIMON
Clerk

TELEPHONE
(314) 751-4144

July 29, 1981

Mr. Steven W. Garrett
Assist. Attorney General
P. O. Box 899
Jefferson City, MO 65102

In re: State of Missouri vs. Stanley G. Helton No. 63230

Dear Mr. Garrett:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Respondent's Motion for rehearing overruled".

Very truly yours,

THOMAS F. SIMON
Clerk.

cc: Mr. Darryl L. Hicks

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. RANDY LEE SINCLAIR, *Appellant.*	No. 63231

APPEAL FROM THE CIRCUIT COURT OF
GREENE COUNTY, MISSOURI

Honorable John C. Crow, Judge

Reexamination on order of the United States Supreme Court

PER CURIAM:

This case together with several others[1] was ordered reexamined in light of Albernaz v. United States, 450 U.S. ____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). Since

[1]*See* State v. Counselman, 603 S.W.2d 3 (Mo.App. 1980); State v. McGee, 602 S.W.2d 709 (Mo.App. 1980); State v. Payne, 607 S.W.2d 822 (Mo.App. 1980); State v. White, 610 S.W.2d 646 (Mo.App. 1980); State v. (Johnny) Williams, 610 S.W.2d 644 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Counselman, ____ U.S. ____, 101 S.Ct. 1690, 68 L.Ed.2d 190 (March 23, 1981). *See* Brown v. State, 607 S.W.2d 801 (Mo.App. 1980); State v. Collins, 607 S.W.2d 781 (Mo.App. 1980); State v. Hawkins, 608 S.W.2d 496 (Mo.App. 1980); State v. (Eddie) Greer, 609 S.W.2d 423 (Mo.App. 1980); State v. Martin, 610 S.W.2d

(Continued on next page)

all of the courts of appeals rulings were based upon our ruling in State v. Sours, 593 S.W.2d 208 (Mo. banc 1980) (Sours I) or State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), the cases were all ordered transferred to this Court. Our examination of the double jeopardy issue made in light of *Albernaz* pursuant to the orders of the United States Supreme Court, appears in State v. Haggard, ____ S.W.2d ____ (Mo. banc No. 62227), decided July 14, 1981.

The original opinion filed by the Missouri Court of Appeals, Southern District, State v. Sinclair, 606 S.W.2d 271 (Mo.App. 1980), is approved and affirmed and by reference made a part of this opinion. State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), *cert. denied*, Missouri v. Sours, 101 S.Ct. 2935 (1981); and State v. Haggard, ____ S.W.2d ____, (Mo. banc No. 62227), decided July 14, 1981.

Footnote continued

18 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Western District, in Missouri v. Brown, ____ U.S. ____, 101 S.Ct. 1735, 68 L.Ed.2d 222 (March 30, 1981). *See* State v. Sinclair, 606 S.W.2d 271 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Southern District, in Missouri v. Sinclair, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. Lowery, 608 S.W.2d 445 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Lowery, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. (Timothy) Crews, 607 S.W.2d 759 (Mo.App. 1980); State v. (Terry) Crews, 607 S.W.2d 729 (Mo.App. 1980); State v. Helton, 607 S.W.2d 772 (Mo.App. 1980); State v. Tunstall, 607 S.W.2d 809 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District in Missouri v. Crews, ____ U.S. ____, 49 U.S.L.W. 3953 (June 22, 1981). In all of the above cases where an application for transfer to this Court was requested, all such applications were denied.

See State v. (Donald) Greer, 605 S.W.2d 93 (Mo. 1980); State v. Kendrick, 606 S.W.2d 643 (Mo. 1980); and State v. (Rollan Anthony) Williams, 606 S.W.2d 777 (Mo. 1980), all of which were vacated and remanded to this Court in Missouri v. Greer, ____ U.S. ____, 49 U.S.L.W. 3882 (May 26, 1981).

The sentence and judgment for armed criminal action is reversed and set aside. The sentence and judgment of conviction for second degree assault is affirmed.

Donnelly, C.J., Seiler, Welliver, Morgan, Higgins, and Bardgett, JJ., concur; Rendlen, J., concurs in part and dissents in part in separate opinion filed.

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. RANDY LEE SINCLAIR, *Appellant.*	No. 63231

OPINION CONCURRING IN PART AND DISSENTING IN PART

I join the majority in its affirmance of appellant's conviction for second degree assault. However, I dissent to that portion of the majority opinion reversing appellant's conviction for armed criminal action for the same reasons set forth in my dissenting opinion in State v. Haggard, No. 62227, decided this date.

ALBERT L. RENDLEN, Judge

Clerk of the Supreme Court

STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102

THOMAS F. SIMON
Clerk

TELEPHONE
(314) 751-4144

July 29, 1981

Mr. Steven W. Garrett
Assist. Attorney General
P. O. Box 899
Jefferson City, MO 65102

In re: State of Missouri vs. Randy Lee Sinclair No. 63231

Dear Mr. Garrett:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Respondent's Motion for rehearing overruled".

Very truly yours,

THOMAS F. SIMON
Clerk.

cc: Mr. Lawrence A. Smith

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI,
Respondent,

vs.

TIMOTHY CREWS,
Appellant.

No. 63227

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI

Honorable Daniel T. Tillman, Judge

Reexamination on order of the United States Supreme Court

PER CURIAM:

This case together with several others[1] was ordered reexamined in light of Albernaz v. United States, 450

[1]*See* State v. Counselman, 603 S.W.2d 3 (Mo.App. 1980); State v. McGee, 602 S.W.2d 709 (Mo.App. 1980); State v. Payne, 607 S.W.2d 822 (Mo.App. 1980); State v. White, 610 S.W.2d 646 (Mo.App. 1980); State v. (Johnny) Williams, 610 S.W.2d 644 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Counselman, ____ U.S. ____, 101 S.Ct. 1690, 68 L.Ed.2d 190 (March 23, 1981). *See* Brown v. State, 607 S.W.2d 801 (Mo.App. 1980); State v. Collins, 607 S.W.2d 781 (Mo.App. 1980); State v. Hawkins, 608 S.W.2d 496 (Mo.App. 1980); State v. (Eddie) Greer, 609 S.W.2d 423 (Mo.App. 1980); State v. Martin, 610 S.W.2d 18 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Western District, in Missouri v. Brown, ____ U.S. ____, 101 S.Ct. 1735, 68 L.Ed.2d 222 (March 30, 1981). *See* State v. Sinclair, 606 S.W.2d 271 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Southern District, in Missouri v. Sinclair, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. Lowery, 608 S.W.2d 445 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Lowery, ____ U.S. ____, 49

(Continued on next page)

U.S. ____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). Since all of the courts of appeals rulings were based upon our ruling in State v. Sours, 593 S.W.2d 208 (Mo. banc 1980) (Sours I) or State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), the cases were all ordered transferred to this Court. Our examination of the double jeopardy issue made in light of *Albernaz* pursuant to the orders of the United States Supreme Court, appears in State v. Haggard, ____ S.W.2d ____ (Mo. banc No. 62227), decided July 14, 1981.

The original opinion filed by the Missouri Court of Appeals, Eastern District, State v. Crews, 607 S.W.2d 759 (Mo.App. 1980), is approved and affirmed and by reference made a part of this opinion. State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), *cert. denied*, Missouri v. Sours, 101 S.Ct. 2935 (1981); and State v. Haggard, ____ S.W.2d ____, (Mo. banc No. 62227), decided July 14, 1981.

The armed criminal action conviction is reversed. The robbery and kidnapping convictions are affirmed.

Donnelly, C.J., Seiler, Welliver, Morgan, Higgins, and Bardgett, JJ., concur; Rendlen, J., concurs in part and dissents in part in separate opinion filed.

Footnote continued

U.S.L.W. 3911 (June 8, 1981). *See* State v. (Timothy) Crews, 607 S.W.2d 759 (Mo.App. 1980); State v. (Terry) Crews, 607 S.W.2d 729 (Mo.App. 1980); State v. Helton, 607 S.W.2d 772 (Mo.App. 1980); State v. Tunstall, 607 S.W.2d 809 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District in Missouri v. Crews, ____ U.S. ____, 49 U.S.L.W. 3953 (June 22, 1981). In all of the above cases where an application for transfer to this Court was requested, all such applications were denied.

See State v. (Donald) Greer, 605 S.W.2d 93 (Mo. 1980); State v. Kendrick, 606 S.W.2d 643 (Mo. 1980); and State v. (Rollan Anthony) Williams, 606 S.W.2d 777 (Mo. 1980) all of which were vacated and remanded to this Court in Missouri v. Greer, ____ U.S., 49 U.S.L.W. 3882 (May 26, 1981).

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. TIMOTHY CREWS, *Appellant.*	No. 63227

OPINION CONCURRING IN PART AND DISSENTING IN PART

I join the majority in its affirmance of appellant's convictions for robbery and kidnapping. However, I dissent to that portion of the majority opinion reversing appellant's conviction for armed criminal action for the same reasons set forth in my dissenting opinion in State v. Haggard, No. 62227, decided this date.

ALBERT L. RENDLEN, Judge

Clerk of the Supreme Court
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102

THOMAS F. SIMON
Clerk

TELEPHONE
(314) 751-4144

July 29, 1981

Mr. Steven W. Garrett
Assist. Attorney General
P. O. Box 899
Jefferson City, MO 65102

In re: State of Missouri vs. Timothy Crews No. 63227

Dear Mr. Garrett:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Respondent's Motion for rehearing overruled".

Very truly yours,

THOMAS F. SIMON
Clerk.

cc: Mr. Leonard W. Buckley, Jr.

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. WILLIE TUNSTALL, *Appellant.*	No. 63229

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI

Honorable Floyd McBride, Judge

Reexamination on order of the United States Supreme Court

PER CURIAM:

This case together with several others[1] was ordered reexamined in light of Albernaz v. United States, 450

[1]*See* State v. Counselman, 603 S.W.2d 3 (Mo.App. 1980); State v. McGee, 602 S.W.2d 709 (Mo.App. 1980); State v. Payne, 607 S.W.2d 822 (Mo.App. 1980); State v. White, 610 S.W.2d 646 (Mo.App. 1980); State v. (Johnny) Williams, 610 S.W.2d 644 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Counselman, ____ U.S. ____, 101 S.Ct. 1690, 68 L.Ed.2d 190 (March 23, 1981). *See* Brown v. State, 607 S.W.2d 801 (Mo.App. 1980); State v. Collins, 607 S.W.2d 781 (Mo.App. 1980); State v. Hawkins, 608 S.W.2d 496 (Mo.App. 1980); State v. (Eddie) Greer, 609 S.W.2d 423 (Mo.App. 1980); State v. Martin, 610 S.W.2d 18 (Mo. App. 1890), all of which were vacated and remanded to the Court of Appeals, Western District, in Missouri v. Brown, ____ U.S. ____, 101 S.Ct.

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U.S. ____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). Since all of the courts of appeals rulings were based upon our ruling in State v. Sours, 593 S.W.2d 208 (Mo. banc 1980) (Sours I) or State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), the cases were all ordered transferred to this Court. Our examination of the double jeopardy issue made in light of *Albernaz* pursuant to the orders of the United States Supreme Court, appears in State v. Haggard, ____ S.W.2d ____ (Mo. banc No. 62227), decided July 14, 1981.

The original opinion filed by the Missouri Court of Appeals, Eastern District, State v. Tunstall, 607 S.W.2d 809 (Mo.App. 1980), is approved and affirmed and by reference made a part of this opinion. State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), *cert. denied*, Missouri v. Sours, 101 S.Ct. 2935 (1981); and State v. Haggard, ____ S.W.2d ____, (Mo. banc No. 62227), decided July 14, 1981.

Footnote continued

1735, 68 L.Ed.2d 222 (March 30, 1981). *See* State v. Sinclair, 606 S.W. 2d 271 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Southern District, in Missouri v. Sinclair, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. Lowery, 608 S.W.2d 445 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Lowery, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. (Timothy) Crews, 607 S.W.2d 759 (Mo.App. 1980); State v. (Terry) Crews, 607 S.W.2d 729 (Mo.App. 1980); State v. Helton, 607 S.W.2d 772 (Mo.App. 1980); State v. Tunstall, 607 S.W.2d 809 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District in Missouri v. Crews, ____ U.S. ____, 49 U.S.L.W. 3953 (June 22, 1981). In all of the above cases where an application for transfer to this Court was requested, all such applications were denied.

See State v. (Donald) Greer, 605 S.W.2d 93 (Mo. 1980); State v. Kendrick, 606 S.W.2d 643 (Mo. 1980); and State v. (Rollan Anthony) Williams, 606 S.W.2d 777 (Mo. 1980), all of which were vacated and remanded to this Court in Missouri v. Greer, ____ U.S. ____, 49 U.S.L.W. 3882 (May 26, 1981).

Appellant's conviction of and sentence for attempted first degree robbery is affirmed. Appellant's conviction of and sentence for armed criminal action is reversed.

Donnelly, C.J., Seiler, Welliver, Morgan, Higgins, and Bardgett, JJ., concur; Rendlen, J., concurs in part and dissents in part in separate opinion filed.

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. WILLIE TUNSTALL, *Appellant.*	No. 63229

OPINION CONCURRING IN PART AND DISSENTING IN PART

I join the majority in its affirmance of appellant's conviction for attempted first degree robbery. However, I dissent to that portion of the majority opinion reversing appellant's conviction for armed criminal action for the same reasons set forth in my dissenting opinion in State v. Haggard, No. 62227, decided this date.

ALBERT L. RENDLEN, Judge

Clerk of the Supreme Court
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102

THOMAS F. SIMON
Clerk

TELEPHONE
(314) 751-4144

July 29, 1981

Mr. Steven W. Garrett
Assist. Attorney General
P. O. Box 899
Jefferson City, MO 65102

In re: State of Missouri vs. Willie Tunstall No. 63229

Dear Mr. Garrett:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Respondent's Motion for rehearing overruled".

Very truly yours,

THOMAS F. SIMON
Clerk.

cc: Mr. Joseph Webb

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. TERRY GENE CREWS, *Appellant.*	No. 63228

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI

Honorable Thomas W. Challis, Judge

Reexamination on order of the United States Supreme Court

PER CURIAM:

This case together with several others[1] was ordered reexamined in light of Albernaz v. United States, 450 U.S. ____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). Since all of the courts of appeals rulings were based upon our

[1]*See* State v. Counselman, 603 S.W.2d 3 (Mo.App. 1980); State v. McGee, 602 S.W.2d 709 (Mo.App. 1980); State v. Payne, 607 S.W.2d 822 (Mo.App. 1980); State v. White, 610 S.W.2d 646 (Mo.App. 1980); State v. (Johnny) Williams, 610 S.W.2d 644 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Counselman, ____ U.S. ____, 101 S.Ct. 1690, 68 L.Ed.2d 190 (March 23, 1981). *See* Brown v. State, 607 S.W.2d 801 (Mo.App. 1980); State v. Collins, 607 S.W.2d 781 (Mo.App. 1980); State v. Hawkins, 608 S.W.2d 496 (Mo.App. 1980); State v. (Eddie)

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ruling in State v. Sours, 593 S.W.2d 208 (Mo. banc 1980) (Sours I) or State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), the cases were all ordered transferred to this Court. Our examination of the double jeopardy issue made in light of *Albernaz* pursuant to the orders of the United States Supreme Court, appears in State v. Haggard, ____ S.W.2d ____ (Mo. banc No. 62227), decided July 14, 1981.

The original opinion filed by the Missouri Court of Appeals, Eastern District, State v. Crews, 607 S.W.2d 729 (Mo.App. 1980), is approved and affirmed and by reference made a part of this opinion. State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), *cert. denied,* Missouri v. Sours, 101 S.Ct. 2935 (1981); and State v. Haggard, ____ S.W.2d ____, (Mo. banc No. 62227), decided July 14, 1981.

Footnote continued

Greer, 609 S.W.2d 423 (Mo.App. 1980); State v. Martin, 610 S.W.2d 18 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Western District, in Missouri v. Brown, ____ U.S. ____, 101 S.Ct. 1735, 68 L.Ed.2d 222 (March 30, 1981). *See* State v. Sinclair, 606 S.W.2d 271 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Southern District, in Missouri v. Sinclair, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. Lowery, 608 S.W.2d 445 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Lowery, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. (Timothy) Crews, 607 S.W.2d 759 (Mo.App. 1980); State v. (Terry) Crews, 607 S.W.2d 729 (Mo.App. 1980); State v. Helton, 607 S.W.2d 772 (Mo.App. 1980); State v. Tunstall, 607 S.W.2d 809 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District in Missouri v. Crews, ____ U.S. ____, 49 U.S.L.W. 3953 (June 22, 1981). In all of the above cases where an application for transfer to this Court was requested, all such applications were denied.

See State v. (Donald) Greer, 605 S.W.2d 93 (Mo. 1980); State v. Kendrick, 606 S.W.2d 643 (Mo. 1980); and State v. (Rollan Anthony) Williams, 606 S.W.2d 777 (Mo. 1980); all of which were vacated and remanded to this Court in Missouri v. Greer, ____ U.S. ____, 49 U.S.L.W. 3882 (May 26, 1981).

The judgment of conviction for armed criminal action is reversed. The judgment of conviction for robbery first degree and for kidnapping is affirmed.

Donnelly, C.J., Seiler, Welliver, Morgan, Higgins, and Bardgett, JJ., concur; Rendlen, J., concurs in part and dissents in part in separate opinion filed.

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. TERRY GENE CREWS, *Appellant.*	No. 63228

OPINION CONCURRING IN PART AND DISSENTING IN PART

I join the majority in its affirmance of appellant's convictions for robbery first degree and for kidnapping. However, I dissent to that portion of the majority opinion reversing appellant's conviction for armed criminal action for the same reasons set forth in my dissenting opinion in State v. Haggard, No. 62227, decided this date.

ALBERT L. RENDLEN, Judge

Clerk of the Supreme Court

STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102

THOMAS F. SIMON
Clerk

TELEPHONE
(314) 751-4144

July 29, 1981

Mr. Steven W. Garrett
Assist. Attorney General
P. O. Box 899
Jefferson City, MO 65102

In re: State of Missouri vs. Terry Gene Crews No. 63228

Dear Mr. Garrett:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Respondent's Motion for rehearing overruled".

Very truly yours,

THOMAS F. SIMON
Clerk.

cc: Mary Kay Wefelmeyer

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI,
Respondent,

vs.

ROBERT LOWERY,
Appellant.

No. 62710

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI

Honorable Michael F. Godfrey, Judge

Reexamination on order of the United States Supreme Court

PER CURIAM:

This case together with several others[1] was ordered reexamined in light of Albernaz v. United States, 450

[1]*See* State v. Counselman, 603 S.W.2d 3 (Mo.App. 1980); State v. McGee, 602 S.W.2d 709 (Mo.App. 1980); State v. Payne, 607 S.W.2d 822 (Mo.App. 1980); State v. White, 610 S.W.2d 646 (Mo.App. 1980); State v. (Johnny) Williams, 610 S.W.2d 644 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Counselman, ____ U.S. ____, 101 S.Ct. 1690, 68 L.Ed.2d 190 (March 23, 1981). *See* Brown v. State, 607 S.W.2d 801 (Mo.App. 1980); State v. Collins, 607 S.W.2d 781 (Mo.App. 1980); State v. Hawkins, 608 S.W.2d 496 (Mo.App. 1980); State v. (Eddie) Greer, 609 S.W.2d 423 (Mo.App. 1980); State v. Martin, 610 S.W.2d 18 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Western District, in Missouri v. Brown, ____ U.S.

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U.S. ____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). Since all of the courts of appeals rulings were based upon our ruling in State v. Sours, 593 S.W.2d 208 (Mo. banc 1980) (Sours I) or State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), the cases were all ordered transferred to this Court. Our examination of the double jeopardy issue made in light of *Albernaz* pursuant to the orders of the United States Supreme Court, appears in State v. Haggard, ____ S.W.2d ____ (Mo. banc No. 62227), decided July 14, 1981.

The original opinion filed by the Missouri Court of Appeals, Eastern District, State v. Lowery, 608 S.W.2d 445 (Mo.App. 1980), is approved and affirmed and by reference made a part of this opinion. State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), *cert. denied*, Missouri v. Sours, 101 S.Ct. 2935 (1981); and State v. Haggard, ____ S.W.2d ____, (Mo. banc No. 62227), decided July 14, 1981.

Footnote continued

____, 101 S.Ct. 1735, 68 L.Ed.2d 222 (March 30, 1981). *See* State v. Sinclair, 606 S.W.2d 271 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Southern District, in Missouri v. Sinclair, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. Lowery, 608 S.W.2d 445 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Lowery, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. (Timothy) Crews, 607 S.W.2d 759 (Mo.App. 1980); State v. (Terry) Crews, 607 S.W.2d 729 (Mo.App. 1980); State v. Helton, 607 S.W.2d 772 (Mo.App. 1980); State v. Tunstall, 607 S.W.2d 809 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District in Missouri v. Crews, ____ U.S. ____, 49 U.S.L.W. 3953 (June 22, 1981). In all of the above cases where an application for transfer to this Court was requested, all such applications were denied.

See State v. (Donald) Greer, 605 S.W.2d 93 (Mo. 1980); State v. Kendrick, 606 S.W.2d 643 (Mo. 1980); and State v. (Rollan Anthony) Williams, 606 S.W.2d 777 (Mo. 1980), all of which were vacated and remanded to this Court in Missouri v. Greer, ____ U.S. ____, 49 U.S.L.W. 3882 (May 26, 1981).

That part of the judgment of the circuit court imposing a twenty year sentence on defendant for armed criminal action is reversed. That part of the judgment of the circuit court imposing a twenty-five year sentence on defendant for first degree robbery is affirmed.

Donnelly, C.J., Seiler, Welliver, Morgan, Higgins, and Bardgett, JJ., concur; Rendlen, J., concurs in part and dissents in part in separate opinion filed.

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. ROBERT LOWERY, *Appellant.*	No. 62170

OPINION CONCURRING IN PART AND DISSENTING IN PART

I join the majority in its affirmance of appellant's conviction for first degree robbery. However, I dissent to that portion of the majority opinion reversing appellant's conviction for armed criminal action for the same reasons set forth in my dissenting opinion in State v. Haggard, No. 62227, decided this date.

ALBERT L. RENDLEN, Judge

Clerk of the Supreme Court
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102

THOMAS F. SIMON
Clerk

TELEPHONE
(314) 751-4144

July 29, 1981

Mr. Steven W. Garrett
Assist. Attorney General
P. O. Box 899
Jefferson City, MO 65102

In re: State of Missouri v. Robert Lowery No. 62710

Dear Mr. Garrett:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Respondent's Motion for rehearing overruled".

Very truly yours,

THOMAS F. SIMON
Clerk.

cc: Lawrence O. Willbrand

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI,
Respondent,

vs.

ROLLAN ANTHONY WILLIAMS,
Appellant.

No. 61595

APPEAL FROM THE CIRCUIT COURT OF
ST. LOUIS COUNTY, MISSOURI

Honorable Philip Sweeney, Judge

Reexamination on order of the
United States Supreme Court

PER CURIAM:

This case together with several others[1] was ordered reexamined in light of Albernaz v. United States, 450

[1]*See* State v. Counselman, 603 S.W.2d 3 (Mo.App. 1980); State v. McGee, 602 S.W.2d 709 (Mo.App. 1980); State v. Payne, 607 S.W.2d 822 (Mo.App. 1980); State v. White, 610 S.W.2d 646 (Mo.App. 1980); State v. (Johnny) Williams, 610 S.W.2d 644 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Counselman, ____ U.S. ____, 101 S.Ct. 1690, 68 L.Ed.2d 190 (March 23, 1981). *See* Brown v. State, 607 S.W.2d 801 (Mo.App. 1980); State v. Collins, 607 S.W.2d 781 (Mo.App. 1980); State v. Hawkins, 608 S.W.2d 496 (Mo.App. 1980); State v. (Eddie) Greer, 609 S.W.2d 423 (Mo.App. 1980); State v. Martin, 610 S.W.2d 18 (Mo.App. 1980), all of which were vacated and remanded to the Court of

(Continued on next page)

U.S. ___, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). Since all of the courts of appeals rulings were based upon our ruling in State v. Sours, 593 S.W.2d 208 (Mo. banc 1980) (Sours I) or State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), those cases were all ordered transferred to this Court. Our examination of the double jeopardy issue made in light of *Albernaz* pursuant to the orders of the United States Supreme Court, appears in State v. Haggard, ___ S.W.2d ___ (Mo. banc No. 62227), decided July 14, 1981.

The original opinion filed by this Court, State v. Williams, 606 S.W.2d 777 (Mo. 1980), is approved and affirmed and by reference made a part of this opinion. State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), *cert. denied,* Missouri v. Sours, 101 S.Ct. 2935 (1981); and State v. Haggard, ___ S.W.2d ___, (Mo. banc No. 62227), decided July 14, 1981.

Footnote continued

Appeals, Western District, in Missouri v. Brown, ___ U.S. ___, 101 S.Ct. 1735, 68 L.Ed.2d 222 (March 30, 1981). *See* State v. Sinclair, 606 S.W.2d 271 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Southern District, in Missouri v. Sinclair, ___ U.S. ___, 49 U.S. L.W. 3911 (June 8, 1981). *See* State v. Lowery, 608 S.W.2d 445 (Mo. App. 1980), vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Lowery, ___ U.S. ___, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. (Timothy) Crews, 607 S.W.2d 759 (Mo.App. 1980); State v. (Terry) Crews, 607 S.W.2d 729 (Mo.App. 1980); State v. Helton, 607 S.W.2d 772 (Mo.App. 1980); State v. Tunstall, 607 S.W.2d 809 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District in Missouri v. Crews, ___ U.S. ___, 49 U.S.L.W. 3953 (June 22, 1981). In all of the above cases where an application for transfer to this Court was requested, all such applications were denied.

See State v. (Donald) Greer, 605 S.W.2d 93 (Mo. 1980); State v. Kendrick, 606 S.W.2d 643 (Mo. 1980); and State v. (Rollan Anthony) Williams, 606 S.W.2d 777 (Mo. 1980), all of which were vacated and remanded to this Court in Missouri v. Greer, ___ U.S. ___, 49 U.S.L.W. 3882 (May 26, 1981).

Judgment affirmed as to Counts I and III; reversed as to Counts II and IV.

Donnelly, C.J., Seiler, Welliver, Morgan, Higgins, and Bardgett, JJ., concur; Rendlen, J., concurs in part and dissents in part in separate opinion filed.

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. ROLLAN ANTHONY WILLIAMS, *Appellant.*	No. 61555

OPINION CONCURRING IN PART AND DISSENTING IN PART

I join the majority in its affirmance of appellant's convictions for two counts of robbery in the first degree. However, I dissent to that portion of the majority opinion reversing appellant's convictions for armed criminal action for the same reasons set forth in my dissenting opinion in State v. Haggard, No. 62227, decided this date.

ALBERT A. RENDLEN, Judge

Clerk of the Supreme Court
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102

THOMAS F. SIMON
Clerk

TELEPHONE
(314) 751-4144

July 29, 1981

Mr. Steven W. Garrett
Assist. Attorney General
P. O. Box 899
Jefferson City, MO 65102

In re: State of Missouri v. Rollan Anthony Williams
No. 61595

Dear Mr. Garrett:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Respondent's Motion for rehearing overruled".

Very truly yours,

THOMAS F. SIMON
Clerk.

cc: Michael Gorla

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. TOMMY BRYANT KENDRICK, *Appellant.*	No. 61936

APPEAL FROM THE CIRCUIT COURT OF
JASPER COUNTY, MISSOURI

Honorable Herbert C. Casteel, Judge

Reexamination on order of the United States Supreme Court

PER CURIAM:

This case together with several others[1] was ordered reexamined in light of Albernaz v. United States, 450 U.S. ____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). Since all of the courts of appeals rulings were based upon our rul-

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[1]*See* State v. Counselman, 603 S.W.2d 3 (Mo.App. 1980); State v. McGee, 602 S.W.2d 709 (Mo.App. 1980); State v. Payne, 607 S.W.2d 822 (Mo.App. 1980); State v. White, 610 S.W.2d 646 (Mo.App. 1980); State v. (Johnny) Williams, 610 S.W.2d 644 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Counselman, ____ U.S. ____, 101 S.Ct. 1690, 68 L.Ed.2d 190 (March 23, 1981). *See* Brown v. State, 607 S.W.2d (Mo. App. 1980); State v. Collins, 607 S.W.2d 781 (Mo.App. 1980); State

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ing in State v. Sours, 593 S.W.2d 208 (Mo. banc 1980) (Sours I) or State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), those cases were all ordered transferred to this Court. Our examination of the double jeopardy issue made in light of *Albernaz* pursuant to the orders of the United States Supreme Court, appears in State v. Haggard, ____ S.W.2d ____ (Mo. banc No. 62227), decided July 14, 1981.

The original opinion filed by this Court, State v. Kendrick, 606 S.W.2d 643 (Mo. 1980), is approved and affirmed and by reference made a part of this opinion. State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), cert. denied, *Missouri* v. *Sours*, 101 S.Ct. 2935 (1981); and State v. Haggard, ____ S.W.2d ____, (Mo. banc No. 62227), decided July 14, 1981.

Footnote continued

v. Hawkins, 608 S.W.2d 496 (Mo.App. 1980); State v. (Eddie) Greer, 609 S.W.2d 423 (Mo.App. 1980); State v. Martin, 610 S.W.2d 18 (Mo. App. 1980), all of which were vacated and remanded to the Court of Appeals, Western District, in Missouri v. Brown, ____ U.S. ____, 101 S.Ct. 1735, 68 L.Ed.2d 222 (March 30, 1981). *See* State v. Sinclair, 606 S.W.2d 271 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Southern District, in Missouri v. Sinclair, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. Lowery, 608 S.W.2d 445 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Lowery, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. (Timothy) Crews, 607 S.W.2d 759 (Mo. App. 1980); State v. (Terry) Crews, 607 S.W.2d 729 (Mo.App. 1980); State v. Helton, 607 S.W.2d 772 (Mo.App. 1980); State v. Tunstall, 607 S.W.2d 809 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District in Missouri v. Crews, ____ U.S. ____, 49 U.S.L.W. 3953 (June 22, 1981). In all of the above cases where an application for transfer to this Court was requested, all such applications were denied.

See State v. (Donald) Greer, 605 S.W.2d 93 (Mo. 1980); State v. Kendrick, 606 S.W.2d 643 (Mo. 1980); and State v. (Rollan Anthony) Williams, 606 S.W.2d 777 (Mo. 1980), all of which were vacated and remanded to this Court in Missouri v. Greer, ____ U.S. ____, 49 U.S.L.W. 3882 (May 26, 1981).

The judgment of conviction on Count V for robbery in the first degree is affirmed. The judgment of conviction on Counts II, IV, VI and VIII (each based on armed criminal action) is reversed.

Donnelly, C.J., Seiler, Welliver, Morgan, Higgins, and Bardgett, JJ., Concur; Rendlen, J., concurs in part and dissents in part in separate opinion filed.

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. TOMMY BRYANT KENDRICK, *Appellant.*	No. 61936

OPINION CONCURRING IN PART AND DISSENTING IN PART

I join the majority in its affirmance of appellant's convictions for four counts of robbery in the first degree by means of a dangerous and deadly weapon. However, I dissent to that portion of the majority opinion reversing appellant's conviction for armed criminal action for the same reasons set forth in my dissenting opinion in State v. Haggard, No. 62227, decided this date.

ALBERT L. RENDLEN, Judge

Clerk of the Supreme Court
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102

THOMAS F. SIMON
Clerk

TELEPHONE
(314) 751-4144

July 29, 1981

Mr. Steven W. Garrett
Assist. Attorney General
P. O. Box 899
Jefferson City, MO 65102

In re: State of Missouri vs. Tommy Bryant Kendrick
No. 61936

Dear Mr. Garrett:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Respondent's Motion for rehearing overruled".

Very truly yours,

THOMAS F. SIMON
Clerk.

cc: Mr. David Robards

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. JOHNNY WILLIAMS, *Appellant.*	**No. 62185**

APPEAL FROM THE CIRCUIT COURT OF
THE CITY OF ST. LOUIS, MISSOURI

Honorable Lackland Bloom, Judge

Reexamination on order of the United States Supreme Court

PER CURIAM:

This case together with several others[1] was ordered reexamined in light of Albernaz v. United States, 450

[1]*See* State v. Counselman, 603 S.W.2d 3 (Mo.App. 1980); State v. McGee, 602 S.W.2d 709 (Mo.App. 1980); State v. Payne, 607 S.W.2d 822 (Mo.App. 1980); State v. White, 610 S.W.2d 646 (Mo.App. 1980); State v. (Johnny) Williams, 610 S.W.2d 644 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Counselman, ____ U.S. ____, 101 S.Ct. 1690, 68 L.Ed.2d 190 (March 23, 1981). *See* Brown v. State, 607 S.W.2d 801 (Mo.App. 1980); State v. Collins, 607 S.W.2d 781 (Mo.App. 1980); State v. Hawkins, 608 S.W.2d 496 (Mo.App. 1980); State v. (Eddie) Greer, 609 S.W.2d 423 (Mo.App. 1980); State v. Martin, 610 S.W.2d 18 (Mo.App. 1980), all of which were vacated and remanded to the

(Continued on next page)

U.S. ____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). Since all of the courts of appeals rulings were based upon our ruling in State v. Sours, 593 S.W.2d 208 (Mo. banc 1980) (Sours I) or State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), the cases were all ordered transferred to this Court. Our examination of the double jeopardy issue made in light of *Albernaz* pursuant to the orders of the United States Supreme Court, appears in State v. Haggard, ____ S.W.2d ____ (Mo. banc No. 62227), decided July 14, 1981.

The original opinion filed by the Missouri Court of Appeals, Easern District, State v. Williams, 610 S.W.2d 644 (Mo.App., 1980), is approved and affirmed and by reference made a part of this opinion. State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), *cert. denied,* Missouri v. Sours, 101 S.Ct. 2935 (1981); and State v. Haggard, ____ S.W.2d ____, (Mo. banc No. 62227), decided July 14, 1981.

Footnote continued

Court of Appeals, Western District, in Missouri v. Brown, ____ U.S. ____, 101 S.Ct. 1735, 68 L.Ed.2d 222 (March 30, 1981). *See* State v. Sinclair, 606 S.W.2d 271 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Southern District, in Missouri v. Sinclair, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. Lowery, 608 S.W.2d 445 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Lowery, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. (Timothy) Crews, 607 S.W.2d 759 (Mo.App. 1980); State v. (Terry) Crews, 607 S.W.2d 729 (Mo.App. 1980); State v. Helton, 607 S.W.2d 772 (Mo.App. 1980); State v. Tunstall, 607 S.W.2d 809 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District in Missouri v. Crews, ____ U.S. ____, 49 U.S.L.W. 3953 (June 22, 1981). In all of the above cases where an application for transfer to this Court was requested, all such applications were denied.

See State v. (Donald) Greer, 605 S.W.2d 93 (Mo. 1980); State v. Kendrick, 606 S.W.2d 643 (Mo. 1980); and State v. (Rollan Anthony) Williams, 606 S.W.2d 777 (Mo. 1980), all of which were vacated and remanded to this Court in Missouri v. Greer, ____ U.S. ____, 49 U.S.L.W. 3882 (May 26, 1981).

We reverse the conviction and sentence for armed criminal action. We affirm the convictions and sentences for assault with intent to rape with malice aforethought and carrying a concealed weapon.

Donnelly, C.J., Seiler, Welliver, Morgan, Higgins, and Bardgett, JJ., concur; Rendlen, J., concurs in part and dissents in part in separate opinion filed.

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. JOHNNY WILLIAMS, *Appellant.*	No. 62185

OPINION CONCURRING IN PART AND DISSENTING IN PART

I join the majority in its affirmance of appellant's convictions for assault with intent to rape with malice aforethought and carrying a concealed weapon. However, I dissent to that portion of the majority opinion reversing appellant's conviction for armed criminal action for the same reasons set forth in my dissenting opinion in State v. Haggard, No. 62227, decided this date.

ALBERT L. RENDLEN, Judge

Clerk of the Supreme Court
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102

THOMAS F. SIMON
Clerk

TELEPHONE
(314) 751-4144

July 29, 1981

Mr. Steven W. Garrett
Assist. Attorney General
P. O. Box 899
Jefferson City, MO 65102

in re: State of Missouri vs. Johnny Williams No. 62185

Dear Mr. Garrett:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Respondent's Motion for rehearing overruled".

Very truly yours,

THOMAS F. SIMON
Clerk.

cc: Mr. Leonard Buckley

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. WALLACE D. COUNCILMAN, JR., *Appellant.*	No. 63137

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI

Honorable Arthur Litz, Judge

Reexamination on order of the United States Supreme Court

PER CURIAM:

This case together with several others[1] was ordered reexamined in light of Albernaz v. United States, 450

[1]*See* State v. Counselman, 603 S.W.2d 3 (Mo.App. 1980); State v. McGee, 602 S.W.2d 709 (Mo.App. 1980); State v. Payne, 607 S.W.2d 822 (Mo.App. 1980); State v. White, 610 S.W.2d 646 (Mo.App. 1980); State v. (Johnny) Williams, 610 S.W.2d 644 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Counselman, ____ U.S. ____, 101 S.Ct. 1690, 68 L.Ed.2d 190 (March 23, 1981). *See* Brown v. State, 607 S.W.2d 801 (Mo.App. 1980); State v. Collins, 607 S.W.2d 781 (Mo.App. 1980); State v. Hawkins, 608 S.W.2d 496 (Mo.App. 1980); State v. (Eddie) Greer, 609 S.W.2d 423 (Mo.App. 1980); State v. Martin, 610 S.W.2d 18 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Western District, in Missouri v. Brown, ____ U.S.

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U.S. ____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). Since all of the courts of appeals rulings were based upon our ruling in State v. Sours, 593 S.W.2d 208 (Mo. banc 1980) (Sours I) or State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), the cases were all ordered transferred to this Court. Our examination of the double jeopardy issue made in light of *Albernaz* pursuant to the orders of the United States Supreme Court, appears in State v. Haggard, ____ S.W.2d ____ (Mo. banc No. 62227), decided July 14, 1981.

The original opinion filed by the Missouri Court of Appeals, Eastern District, State v. Counselman, 603 S.W.2d 3 (Mo.App. 1980), is approved and affirmed and by reference made a par of this opinion. State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), *cert. denied*, Missouri v. Sours, 101 S.Ct. 2935 (1981); and State v. Haggard, ____ S.W.2d ____, (Mo. banc No. 62227), decided July 14, 1981.

Footnote continued

____, 101 S.Ct. 1735, 68 L.Ed.2d 222 (March 30, 1981). *See* State v. Sinclair, 606 S.W.2d 271 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Southern District, in Missouri v. Sinclair, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. Lowery, 608 S.W.2d 445 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Lowery, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. (Timothy) Crews, 607 S.W.2d 759 (Mo.App. 1980); State v. (Terry) Crews, 607 S.W.2d 729 (Mo.App. 1980); State v. Helton, 607 S.W.2d 772 (Mo.App. 1980); State v. Tunstall, 607 S.W.2d 809 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District in Missouri v. Crews, ____ U.S. ____, 49 U.S.L.W. 3953 (June 22, 1981). In all of the above cases where an application for transfer to this Court was requested, all such applications were denied.

See State v. (Donald) Greer, 605 S.W.2d 93 (Mo. 1980); State v. Kendrick, 606 S.W.2d 643 (Mo. 1980); and State v. (Rollan Anthony) Williams, 606 S.W.2d 777 (Mo. 1980), all of which were vacated and remanded to this Court in Missouri v. Greer, ____ U.S. ____, 49 U.S.L.W. 3882 (May 26, 1981).

We affirm the judgment convicting appellant of first degree robbery, but we reverse that part of the judgment convicting appellant of armed criminal action.

Donnelly, C.J., Seiler, Welliver, Morgan, Higgins, and Bardgett, JJ., concur; Rendlen, J., concurs in part and dissents in part in separate opinion filed.

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. WALLACE D. COUNSELMAN, JR., *Appellant.*	No. 63137

OPINION CONCURRING IN PART AND DISSENTING IN PART

I join the majority in its affirmance of appellant's conviction for first degree robbery. However, I dissent to that portion of the majority opinion reversing appellant's conviction for armed criminal action for the same reasons set forth in my dissenting opinion in State v. Haggard, No. 62227, decided this date.

ALBERT L. RENDLEN, Judge

Clerk of the Supreme Court

STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102

THOMAS F. SIMON
Clerk

TELEPHONE
(314) 751-4144

July 29, 1981

Mr. Steven W. Garrett
Assist. Attorney General
P. O. Box 899
Jefferson City, MO 65102

In re: State of Missouri vs. Wallace D. Counselman, Jr.
No. 63137

Dear Mr. Garrett:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Respondent's Motion for rehearing overruled".

Very truly yours,

THOMAS F. SIMON
Clerk.

cc: Mr. C. Clifford Schwartz

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI,
Respondent,

vs.

BOBBY JOE McGEE,
Appellant.

No. 63136

APPEAL FROM THE CIRCUIT COURT OF
THE CITY OF ST. LOUIS, MISSOURI

Honorable Michael F. Godfrey, Judge

Reexamination on order of the United States Supreme Court

PER CURIAM:

This case together with several others[1] was ordered reexamined in light of Albernaz v. United States, 450

[1]*See* State v. Counselman, 603 S.W.2d 3 (Mo.App. 1980); State v. McGee, 602 S.W.2d 709 (Mo.App. 1980); State v. Payne, 607 S.W.2d 822 (Mo.App. 1980); State v. White, 610 S.W.2d 646 (Mo.App. 1980); State v. (Johnny) Williams, 610 S.W.2d 644 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Counselman, ____ U.S. ____, 101 S.Ct. 1690, 68 L.Ed.2d 190 (March 23, 1981). *See* Brown v. State, 607 S.W.2d 801 (Mo.App. 1980); State v. Collins, 607 S.W.2d 781 (Mo.App. 1980); State v. Hawkins, 608 S.W.2d 496 (Mo.App. 1980); State v. (Eddie) Greer, 609 S.W.2d 423 (Mo.App. 1980); State v. Martin, 610 S.W.2d 18 (Mo.App. 1980), all of which were vacated and remanded to the

(Continued on next page)

U.S. ____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). Since all of the courts of appeals rulings were based upon our ruling in State v. Sours, 593 S.W.2d 208 (Mo. banc 1980) (Sours I) or State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), the cases were all ordered transferred to this Court. Our examination of the double jeopardy issue made in light of *Albernaz* pursuant to the orders of the United States Supreme Court, appears in State v. Haggard, ____ S.W.2d ____ (Mo. banc No. 62227), decided July 14, 1981.

The original opinion filed by the Missouri Court of Appeals, Eastern District, State v. McGee, 602 S.W.2d 709 (Mo.App. 1980), is approved and affirmed and by reference made a part of this opinion. State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), *cert. denied,* Missouri v. Sours, 101 S.Ct. 2935 (1981); and State v. Haggard, ____ S.W.2d ____, (Mo. banc No. 62227), decided July 14, 1981.

Footnote continued

Court of Appeals, Western District, in Missouri v. Brown, ____ U.S. ____, 101 S.Ct. 1735, 68 L.Ed.2d 222 (March 30, 1981). *See* State v. Sinclair, 606 S.W.2d 271 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Southern District, in Missouri v. Sinclair, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. Lowery, 608 S.W.2d 445 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Lowery, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. (Timothy) Crews, 607 S.W.2d 759 (Mo.App. 1980); State v. (Terry) Crews, 607 S.W.2d 729 (Mo.App. 1980); State v. Helton, 607 S.W.2d 772 (Mo.App. 1980); State v. Tunstall, 607 S.W.2d 809 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District in Missouri v. Crews, ____ U.S. ____, 49 U.S.L.W. 3953 (June 22, 1981). In all of the above cases where an application for transfer to this Court was requested, all such applications were denied.

See State v. (Donald) Greer, 605 S.W.2d 93 (Mo. 1980); State v. Kendrick, 606 S.W.2d 643 (Mo. 1980); and State v. (Rollan Anthony) Williams, 606 S.W.2d 777 (Mo. 1980), all of which were vacated and remanded to this Court in Missouri v. Greer, ____ U.S. ____, 49 U.S.L.W. 3882 (May 26, 1981).

The judgment of conviction on armed criminal action is reversed; the judgment of conviction on assault with intent to do great bodily harm without malice is reversed and remanded for a new trial.

Donnelly, C.J., Seiler, Welliver, Morgan, Higgins, and Bardgett, JJ., concur; Rendlen, J., concurs in part and dissents in part in separate opinion filed.

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. BOBBY JOE McGEE, *Appellant.*	No. 63136

OPINION CONCURRING IN PART AND DISSENTING IN PART

I join the majority in its holding to reverse and remand appellant's conviction for assault with intent to do great bodily harm without malice. However, I dissent to that portion of the majority opinion reversing appellant's conviction for armed criminal action for the same reasons set forth in my dissenting opinion in State v. Haggard, No. 62227, decided this date.

ALBERT L. RENDLEN, Judge

Clerk of the Supreme Court
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102

THOMAS F. SIMON
Clerk

TELEPHONE
(314) 751-4144

July 29, 1981

Mr. Steven W. Garrett
Assist. Attorney General
P. O. Box 899
Jefferson City, MO 65102

In re: State of Missouri vs. Bobby Joe McGee No. 63136

Dear Mr. Garrett:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Respondent's Motion for rehearing overruled".

Very truly yours,

THOMAS F. SIMON
Clerk.

cc: Lang & O'Keefe

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. MICHAEL L. WHITE, *Appellant.*	No. 62243

APPEAL FROM THE CIRCUIT COURT OF
THE CITY OF ST. LOUIS, MISSOURI

Honorable Thomas W. Challis, Judge

Reexamination on order of the United States Supreme Court

PER CURIAM:

This case together with several others[1] was ordered reexamined in light of Albernaz v. United States, 450

[1]*See* State v. Counselman, 603 S.W.2d 3 (Mo.App. 1980); State v. McGee, 602 S.W.2d 709 (Mo.App. 1980); State v. Payne, 607 S.W.2d 822 (Mo.App. 1980); State v. White, 610 S.W.2d 646 (Mo.App. 1980); State v. (Johnny) Williams, 610 S.W.2d 644 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Counselman, ____ U.S. ____, 101 S.Ct. 1690, 68 L.Ed.2d 190 (March 23, 1981). *See* Brown v. State, 607 S.W.2d 801 (Mo.App. 1980); State v. Collins, 607 S.W.2d 781 (Mo.App. 1980); State v. Hawkins, 608 S.W.2d 496 (Mo.App. 1980); State v. (Eddie) Greer, 609 S.W.2d 423 (Mo.App. 1980); State v. Martin, 610 S.W.2d 18 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Western District, in Missouri v. Brown, ____ U.S.

(Continued on next page)

U.S. ____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). Since all of the courts of appeals rulings were based upon our ruling in State v. Sours, 593 S.W.2d 208 (Mo. banc 1980) (Sours I) or State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), the cases were all ordered transferred to this Court. Our examination of the double jeopardy issue made in light of *Albernaz* pursuant to the orders of the United States Supreme Court, appears in State v. Haggard, ____ S.W.2d ____ (Mo. banc No. 62227), decided July 14, 1981.

The original opinion filed by the Missouri Court of Appeals, Eastern District, State v. White, 610 S.W.2d 646 (Mo.App. 1980), is approved and affirmed and by reference made a part of this opinion. State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), *cert. denied,* Missouri v. Sours, 101 S.Ct. 2935 (1981); and State v. Haggard, ____ S.W.2d ____, (Mo. banc No. 62227), decided July 14, 1981.

Footnote continued

____, 101 S.Ct. 1735, 68 L.Ed.2d 222 (March 30, 1981). *See* State v. Sinclair, 606 S.W.2d 271 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Southern District, in Missouri v. Sinclair, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. Lowery, 608 S.W.2d 445 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Lowery, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. (Timothy) Crews, 607 S.W.2d 759 (Mo.App. 1980); State v. (Terry) Crews, 607 S.W.2d 729 (Mo.App. 1980); State v. Helton, 607 S.W.2d 772 (Mo.App. 1980); State v. Tunstall, 607 S.W.2d 809 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District in Missouri v. Crews, ____ U.S. ____, 49 U.S.L.W. 3953 (June 22, 1981). In all of the above cases where an application for transfer to this Court was requested, all such applications were denied.

See State v. (Donald) Greer, 605 S.W.2d 93 (Mo. 1980); State v. Kendrick, 606 S.W.2d 643 (Mo. 1980); and State v. (Rollan Anthony) Williams, 606 S.W.2d 777 (Mo. 1980), all of which were vacated and remanded to this Court in Missouri v. Greer, ____ U.S. ____, 49 U.S.L.W. 3882 (May 26, 1981).

The conviction and judgment is reversed outright with respect to Count III, armed criminal action. The conviction and judgment in Count I, robbery first degree, is affirmed.

Donnelly, C.J., Seiler, Welliver, Morgan, Higgins, and Bardgett, JJ., concur; Rendlen, J., concurs in part and dissents in part in separate opinion filed.

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. MICHAEL L. WHITE, *Appellant.*	No. 62243

OPINION CONCURRING IN PART AND DISSENTING IN PART

I join the majority in its affirmance of appellant's conviciton for robbery first degree. However, I dissent to that portion of the majority opinion reversing appellant's conviction for armed criminal action for the same reasons set forth in my dissenting opinion in State v. Haggard, No. 62227, decided this date.

ALBERT L. RENDLEN, Judge

Clerk of the Supreme Court
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102

THOMAS F. SIMON
Clerk

TELEPHONE
(314) 751-4144

July 29, 1981

Mr. Steven W. Garrett
Assist. Attorney General
P. O. Box 899
Jefferson City, MO 65102

In re: State of Missouri vs. Michael White No. 62243

Dear Mr. Garrett:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Respondent's Motion for rehearing overruled".

Very truly yours,

THOMAS F. SIMON
Clerk.

cc: Mr. Henry B. Robertson

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. MARLON PAYNE, *Appellant.*	No. 63135

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI

Honorable Richard J. Brown, Judge

Reexamination on order of the United States Supreme Court

PER CURIAM:

This case together with several others[1] was ordered reeaxmined in light of Albernaz v. United States, 450

[1]*See* State v. Counselman, 603 S.W.2d 3 (Mo.App. 1980); State v. McGee, 602 S.W.2d 709 (Mo.App. 1980); State v. Payne, 607 S.W.2d 822 (Mo.App. 1980); State v. White, 610 S.W.2d 646 (Mo.App. 1980); State v. (Johnny) Williams, 610 S.W.2d 644 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Counselman, ____ U.S. ____, 101 S.Ct. 1690, 68 L.Ed.2d 190 (March 23, 1981). *See* Brown v. State, 607 S.W.2d 801 (Mo.App. 1980); State v. Collins, 607 S.W.2d 781 (Mo.App. 1980); State v. Hawkins, 608 S.W.2d 496 (Mo.App. 1980); State v. (Eddie) Greer, 609 S.W.2d 423 (Mo.App. 1980); State v. Martin, 610 S.W.2d 18 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Western District, in Missouri v. Brown, ____ U.S.

(Continued on next page)

U.S. ____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). Since all of the courts of appeals rulings were based upon our ruling in State v. Sours, 593 S.W.2d 208 (Mo. banc 1980) (Sours I) or State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), the cases were all ordered transferred to this Court. Our examination of the double jeopardy issue made in light of *Albernaz* pursuant to the orders of the United States Supreme Court, appears in State v. Haggard, ____ S.W.2d ____ (Mo. banc No. 62227), decided July 14, 1981.

The original opinion filed by the Missouri Court of Appeals, Eastern District, State v. Payne, 607 S.W.2d 822 (Mo.App. 1980), is approved and affirmed and by reference made a part of this opinion. State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), *cert. denied,* Missouri v. Sours, 101 S.Ct. 2935 (1981); and State v. Haggard, ____ S.W.2d ____, (Mo. banc No. 62227), decided July 14, 1981.

Footnote continued

____, 101 S.Ct. 1735, 68 L.Ed.2d 222 (March 30, 1981). *See* State v. Sinclair, 606 S.W.2d 271 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Southern District, in Missouri v. Sinclair, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. Lowery, 608 S.W.2d 445 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Lowery, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. (Timothy) Crews, 607 S.W.2d 759 (Mo.App. 1980); State v. (Terry) Crews, 607 S.W.2d 729 (Mo.App. 1980); State v. Helton, 607 S.W.2d 772 (Mo.App. 1980); State v. Tunstall, 607 S.W.2d 809 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District in Missouri v. Crews, ____ U.S. ____, 49 U.S.L.W. 3953 (June 22, 1981). In all of the above cases where an application for transfer to this Court was requested, all such applications were denied.

See State v. (Donald) Greer, 605 S.W.2d 93 (Mo. 1980); State v. Kendrick, 606 S.W.2d 643 (Mo. 1980); and State v. (Rollan Anthony) Williams, 606 S.W.2d 777 (Mo. 1980), all of which were vacated and remanded to this Court in Missouri v. Greer, ____ U.S. ____, 49 U.S.L.W. 3882 (May 26, 1981).

The armed criminal action conviction is reversed. The conviction of robbery first degree is affirmed.

Donnelly, C.J., Seiler, Welliver, Morgan, Higgins, and Bardgett, JJ., concur; Rendlen, J., concurs in part and dissents in part in separate opinion filed.

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. MARLON PAYNE, *Appellant.*	No. 63135

OPINION CONCURRING IN PART AND DISSENTING IN PART

I join the majority in its affirmance of appellant's conviction for first degree robbery. However, I dissent to that portion of the majority opinion reversing appellant's conviction for armed criminal action for the same reasons set forth in my dissenting opinion in State v. Haggard, No. 62227, decided this date.

ALBERT L. RENDLEN, Judge

Clerk of the Supreme Court
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102

THOMAS F. SIMON
Clerk

TELEPHONE
(314) 751-4144

July 29, 1981

Mr. Steven W. Garrett
Assist. Attorney General
P. O. Box 899
Jefferson City, MO 65102

In re: State of Missouri vs. Marlon Payne No. 63135

Dear Mr. Garrett:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Respondent's Motion for rehearing overruled".

Very truly yours,

THOMAS F. SIMON
Clerk.

cc: Mr. John Putzel

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. DONALD GREER, *Appellant.*	No. 61548

APPEAL FROM THE CIRCUIT COURT OF JACKSON, COUNTY MISSOURI

Honorable Gene R. Martin, Judge

Reexamination on order of the United States Supreme Court

PER CURIAM:

This case together with several others[1] was ordered reexamined in light of Albernaz v. United States, 450 U.S.

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[1]*See* State v. Counselman, 603 S.W.2d 3 (Mo.App. 1980); State v. McGee, 602 S.W.2d 709 (Mo.App. 1980); State v. Payne, 607 S.W.2d 822 (Mo.App. 1980); State v. White, 610 S.W.2d 646 (Mo.App. 1980); State v. (Johnny) Williams, 610 S.W.2d 644 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Counselman, ____ U.S. ____, 101 S.Ct. 1690, 68 L.Ed.2d 190 (March 23, 1981). *See* Brown v. State, 607 S.W.2d 801 (Mo.App. 1980); State v. Collins, 607 S.W.2d 781 (Mo.App. 1980); State v. Hawkins, 608 S.W.2d 496 (Mo.App. 1980); State v. (Eddie) Greer, 609 S.W.2d 423 (Mo.App. 1980); State v. Martin, 610

(Continued on next page)

____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). Since all of the court of appeals rulings were based upon our ruling in State v. Sours, 593 S.W.2d 208 (Mo. banc 1980) (Sours I) or State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), those cases were all ordered transferred to this Court. Our examination of the double jeopardy issue made in light of *Albernaz* pursuant to the orders of the United States Supreme Court, appears in State v. Haggard, ____ S.W.2d ____ (Mo. banc No. 62227), decided July 14, 1981.

The original opinion filed by this Court, State v. Greer, 605 S.W.2d 93 (Mo. 1980), is approved and affirmed and by reference made a part of this opinion. State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), *cert. denied,* Missouri v. Sours, 101 S.Ct. 2935 (1981); and State v. Haggard, ____ S.W.2d ____, (Mo. banc No. 62227), decided July 14, 1981.

Footnote continued
S.W.2d 18 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Western District, in Missouri v. Brown, ____ U.S. ____, 101 S.Ct. 1735, 68 L.Ed.2d 222 (March 30, 1981). *See* State v. Sinclair, 606 S.W.2d 271 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Southern District, in Missouri v. Sinclair, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. Lowery, 608 S.W.2d 445 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Lowery, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. (Timothy) Crews, 607 S.W.2d 759 (Mo.App. 1980); State v. (Terry) Crews, 607 S.W.2d 729 (Mo.App. 1980); State v. Helton, 607 S.W.2d 772 (Mo. App. 1980); State v. Tunstall, 607 S.W.2d 809 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District in Missouri v. Crews, ____ U.S. ____, 49 U.S.L.W. 3953 (June 22, 1981). In all of the above cases where an application for transfer to this Court was requested, all such applications were denied.

See State v. (Donald) Greer, 605 S.W.2d 93 (Mo. 1980); State v. Kendrick, 606 S.W.2d 643 (Mo. 1980); and State v. (Rollan Anthony) Williams, 606 S.W.2d 777 (Mo. 1980), all of which were vacated and remanded to this Court in Missouri v. Greer, ____ U.S. ____, 49 U.S.L.W. 3882 (May 26, 1981).

That part of the judgment pertaining to second degree murder is affirmed; that part pertaining to armed criminal action is reversed and the sentence vacated.

Donnelly, C.J., Seiler, Welliver, Morgan, Higgins, and Bardgett, JJ., concur; Rendlen, J., concurs in part and dissents in part in separate opinion filed.

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. DONALD GREER, *Appellant.*	No. 61548

OPINION CONCURRING IN PART AND DISSENTING IN PART

I join the majority in its affirmance of appellant's conviction for murder in the second degree. However, I dissent to that portion of the majority opinion reversing appellant's conviction for armed criminal action for the same reasons set forth in my dissenting opinion in State v. Haggard, No. 62227, decided this date.

ALBERT L. RENDLEN, Judge

Clerk of the Supreme Court
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102

THOMAS F. SIMON
Clerk

TELEPHONE
(314) 751-4144

July 29, 1981

Mr. Steven W. Garrett
Assist. Attorney General
P. O. Box 899
Jefferson City, MO 65102

In re: State of Missouri v. Donald Greer No. 61548

Dear Mr. Garrett:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Respondent's Motion for rehearing overruled".

Very truly yours,

THOMAS F. SIMON
Clerk.

cc: Mr. Philip H. Schwarz

SUPREME COURT OF MISSOURI
EN BANC

WILLIAM BROWN,
Appellant,

vs.

STATE OF MISSOURI,
Respondent.

No. 63147

APPEAL FROM THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

Honorable Timothy D. O'Leary, Judge

Reexamination on order of the
United States Supreme Court

PER CURIAM:

This case together with several others[1] was ordered reexamined in light of Albernaz v. United States, 450 U.S.

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[1]*See* State v. Counselman, 603 S.W.2d 3 (Mo.App. 1980); State v. McGee, 602 S.W.2d 709 (Mo.App. 1980); State v. Payne, 607 S.W.2d 822 (Mo.App. 1980); State v. White, 610 S.W.2d 646 (Mo.App. 1980); State v. (Johnny) Williams, 610 S.W.2d 644 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Counselman, ____ U.S. ____, 101 S.Ct. 1690, 68 L.Ed.2d 190 (March 23, 1981). *See* Brown v. State, 607 S.W.2d 801 (Mo.App. 1980); State v. Collins, 607 S.W.2d 781 (Mo.App. 1980); State v. Hawkins, 608 S.W.2d 496 (Mo.App. 1980); State v. (Eddie) Greer, 609 S.W.2d 423 (Mo.App. 1980); State v. Martin, 610 S.W.2d 18 (Mo.App. 1980), all of which were vacated and remanded to the

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____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). Since all of the courts of appeals rulings were based upon our ruling in State v. Sours, 593 S.W.2d 208 (Mo. banc 1980) (Sours I) or State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), the cases were all ordered transferred to this Court. Our examination of the double jeopardy issue made in light of *Albernaz* pursuant to the orders of the United States Supreme Court, appears in State v. Haggard, ____ S.W.2d ____ (Mo. banc No. 62227), decided July 14, 1981.

The original opinion filed by the Missouri Court of Appeals, Western District, Brown v. State, 607 S.W.2d 801 (Mo.App. 1980), is approved and affirmed and by reference made a part of this opinion. State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), *cert. denied,* Missouri v. Sours, 101 S.Ct. 2935 (1981); and State v. Haggard, ____ S.W.2d ____, (Mo. banc No. 62227), decided July 14, 1981.

Footnote continued

Court of Appeals, Western District, in Missouri v. Brown, ____ U.S. ____, 101 S.Ct. 1735, 68 L.Ed.2d 222 (March 30, 1981). *See* State v. Sinclair, 606 S.W.2d 271 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Southern District, in Missouri v. Sinclair, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. Lowery, 608 S.W.2d 445 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Lowery, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. (Timothy) Crews, 607 S.W.2d 759 (Mo.App. 1980); State v. (Terry) Crews, 607 S.W.2d 729 (Mo.App. 1980); State v. Helton, 607 S.W.2d 772 (Mo.App. 1980); State v. Tunstall, 607 S.W.2d 809 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District in Missouri v. Crews, ____ U.S. ____, 49 U.S.L.W. 3953 (June 22, 1981). In all of the above cases where an application for transfer to this Court was requested, all such applications were denied.

See State v. (Donald) Greer, 605 S.W.2d 93 (Mo. 1980); State v. Kendrick, 606 S.W.2d 643 (Mo. 1980); and State v. (Rollan Anthony) Williams, 606 S.W.2d 777 (Mo. 1980), all of which were vacated and remanded to this Court in Missouri v. Greer, ____ U.S. ____, 49 U.S.L.W. 3882 (May 26, 1981).

The judgment on appellant's 27.26 motion is reversed, and this cause is remanded with directions to enter a judgment denying appellant's motion as to the judgment and sentence for robbery in the first degree. The court is directed to enter judgment vacating the judgment and sentence in the armed criminal action count, Count II.

Donnelly, C.J., Seiler, Welliver, Morgan, Higgins, and Bardgett, JJ., concur; Rendlen, J., concurs in part and dissents in part in separate opinion filed.

SUPREME COURT OF MISSOURI
EN BANC

WILLIAM BROWN, *Appellant,* vs. STATE OF MISSOURI, *Respondent.*	No. 63147

OPINION CONCURRING IN PART AND DISSENTING IN PART

I join the majority in upholding appellant's conviction for robbery in the first degree. However, I dissent to that portion of the majority opinion vacating appellant's conviction for armed criminal action for the same reasons set forth in my dissenting opinion in State v. Haggard, No. 62227, decided this date.

ALBERT L. RENDLEN, Judge

Clerk of the Supreme Court
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102

THOMAS F. SIMON
Clerk

TELEPHONE
(314) 751-4144

July 29, 1981

Mr. Steven W. Garrett
Assist. Attorney General
P. O. Box 899
Jefferson City, MO 65102

In re: William Brown vs. State of Missouri No. 63147

Dear Mr. Garrett:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Respondent's Motion for rehearing overruled".

Very truly yours,

THOMAS F. SIMON
Clerk.

cc: Mr. Stanley L. Morris

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI,
Respondent,

vs.

JACKIE MARTIN,
Appellant.

No. 63151

APPEAL FROM THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

Honorable Donald L. Mason, Judge

Reexamination on order of the
United States Supreme Court

PER CURIAM:

This case together with several others[1] was ordered reexamined in light of Albernaz v. United States, 450 U.S.

---

[1]*See* State v. Counselman, 603 S.W.2d 3 (Mo.App. 1980); State v. McGee, 602 S.W.2d 709 (Mo.App. 1980); State v. Payne, 607 S.W.2d 822 (Mo.App. 1980); State v. White, 610 S.W.2d 646 (Mo.App. 1980); State v. (Johnny) Williams, 610 S.W.2d 644 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Counselman, ____ U.S. ____, 101 S.Ct. 1690, 68 L.Ed.2d 190 (March 23, 1981). *See* Brown v. State, 607 S.W.2d 801 (Mo.App. 1980); State v. Collins, 607 S.W.2d 781 (Mo.App. 1980); State v. Hawkins, 608 S.W.2d 496 (Mo.App. 1980); State v. (Eddie) Greer, 609 S.W.2d 423 (Mo.App. 1980); State v. Martin, 610 S.W.2d

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——, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). Since all of the courts of appeals rulings were based upon our ruling in State v. Sours, 593 S.W.2d 208 (Mo. banc 1980) (Sours I) or State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), the cases were all ordered transferred to this Court. Our examination of the double jeopardy issue made in light of *Albernaz* pursuant to the orders of the United States Supreme Court, appears in State v. Haggard, —— S.W.2d —— (Mo. banc No. 62227), decided July 14, 1981.

The original opinion filed by the Missouri Court of Appeals, Western District, State v. Martin, 610 S.W.2d 18 (Mo.App. 1980), is approved and affirmed and by reference made a part of this opinion. State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), *cert. denied*, Missouri v. Sours, 101 S.Ct. 2935 (1981); and State v. Haggard, —— S.W.2d ——, (Mo. banc No. 62227), decided July 14, 1981.

Footnote continued

18 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Western District, in Missouri v. Brown, —— U.S. ——, 101 S.Ct. 1735, 68 L.Ed.2d 222 (March 30, 1981). *See* State v. Sinclair, 606 S.W.2d 271 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Southern District, in Missouri v. Sinclair, —— U.S. ——, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. Lowery, 608 S.W.2d 445 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Lowery, —— U.S. ——, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. (Timothy) Crews, 607 S.W.2d 759 (Mo.App. 1980); State v. (Terry) Crews, 607 S.W.2d 729 (Mo.App. 1980); State v. Helton, 607 S.W.2d 772 (Mo.App. 1980); State v. Tunstall, 607 S.W.2d 809 (Mo.App.1980), all of which were vacated and remanded to the Court of Appeals, Eastern District in Missouri v. Crews, —— U.S. ——, 49 U.S.L.W. 3953 (June 22, 1981). In all of the above cases where an application for transfer to this Court was requested, all such applications were denied.

See State v. (Donald) Greer, 605 S.W.2d 93 (Mo. 1980); State v. Kendrick, 606 S.W.2d 643 (Mo. 1980); and State v. (Rollan Anthony) Williams, 606 S.W.2d 777 (Mo. 1980), all of which were vacated and remanded to this Court in Missouri v. Greer, —— U.S. ——, 49 U.S.L.W. 3882 (May 26, 1981).

That portion of the judgment related to the conviction for armed criminal action is herein reversed.

That portion of the judgment related to the conviction for armed robbery, first degree, is in all respects affirmed.

Donnelly, C.J., Seiler, Welliver, Morgan, Higgins, and Bardgett, JJ., concur; Rendlen, J., concurs in part and dissents in part in separate opinion filed.

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. JACKIE MARTIN, *Appellant.*	No. 63151

OPINION CONCURRING IN PART AND DISSENTING IN PART

I join the majority in its affirmance of appellant's conviction for robbery first degree. However, I dissent to that portion of the majority opinion reversing appellant's conviction for armed criminal action for the same reasons set forth in my dissenting opinion in State v. Haggard, No. 6227, decided this date.

ALBERT L. RENDLEN, Judge

Clerk of the Supreme Court
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102

THOMAS F. SIMON
Clerk

TELEPHONE
(314) 751-4144

July 29, 1981

Mr. Steven W. Garrett
Assist. Attorney General
P. O. Box 899
Jefferson City, MO 65102

In re: State of Missouri vs. Jackie Martin No. 63151

Dear Mr. Garrett:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Respondent's Motion for rehearing overruled".

Very truly yours,

THOMAS F. SIMON
Clerk.

cc: Mr. James Fletcher

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI,
Respondent,

vs.

EDDIE GREER,
Appellant.

No. 63150

APPEAL FROM THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

Honorable Louis Lombardo, Judge

Reexamination on order of the
United States Supreme Court

PER CURIAM:

This case together with several others[1] was ordered reexamined in light of Albernaz v. United States, 450

[1]*See* State v. Counselman, 603 S.W.2d 3 (Mo.App. 1980); State v. McGee, 602 S.W.2d 709 (Mo.App. 1980); State v. Payne, 607 S.W.2d 822 (Mo.App. 1980); State v. White, 610 S.W.2d 646 (Mo.App. 1980); State v. (Johnny) Williams, 610 S.W.2d 644 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Counselman, ____ U.S. ____, 101 S.Ct. 1690, 68 L.Ed.2d 190 (March 23, 1981). *See* Brown v. State, 607 S.W.2d 801 (Mo.App. 1980); State v. Collins, 607 S.W.2d 781 (Mo.App. 1980); State v. Hawkins, 608 S.W.2d 496 (Mo.App. 1980); State v. (Eddie) Greer, 609 S.W.2d 423 (Mo.App. 1980); State v. Martin, 610 S.W.2d 18 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Western District, in Missouri v. Brown, ____ U.S.

(Continued on next page)

U.S. ____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). Since all of the courts of appeals rulings were based upon our ruling in State v. Sours, 593 S.W.2d 208 (Mo. banc 1980) (Sours I) or State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), the cases were all ordered transferred to this Court. Our examination of the double jeopardy issue made in light of *Albernaz* pursuant to the orders of the United States Supreme Court, appears in State v. Haggard, ____ S.W.2d ____ (Mo. banc No. 62227), decided July 14, 1981.

The original opinion filed by the Missouri Court of Appeals, Western District, State v. Greer, 609 S.W.2d 423 (Mo.App., 1980), is approved and affirmed and by reference made a part of this opinion. State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), *cert. denied*, Missouri v. Sours, 101 S.Ct. 2935 (1981); and State v. Haggard, ____ S.W.2d ____, (Mo. banc No. 62227), decided July 14, 1981.

Footnote continued

____, 101 S.Ct. 1735, 68 L.Ed.2d 222 (March 30, 1981). *See* State v. Sinclair, 606 S.W.2d 271 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Southern District, in Missouri v. Sinclair, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. Lowery, 608 S.W.2d 445 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Lowery, ____ U.S. ____, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. (Timothy) Crews, 607 S.W.2d 759 (Mo.App. 1980); State v. (Terry) Crews, 607 S.W.2d 729 (Mo.App. 1980); State v. Helton, 607 S.W.2d 772 (Mo.App. 1980); State v. Tunstall, 607 S.W.2d 809 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District in Missouri v. Crews, ____ U.S. ____, 49 U.S.L.W. 3953 (June 22, 1981). In all of the above cases where an application for transfer to this Court was requested, all such applications were denied.

See State v. (Donald) Greer, 605 S.W.2d 93 (Mo. 1980); State v. Kendrick, 606 S.W.2d 643 (Mo. 1980); and State v. (Rollan Anthony) Williams, 606 S.W.2d 777 (Mo. 1980), all of which were vacated and remanded to this Court in Missouri v. Greer, ____ U.S. ____, 49 U.S.L.W. 3882 (May 26, 1981).

That portion of the judgment related to the convictions for armed criminal action is reversed. That portion of the judgment relating to the convictions for kidnapping, rape, and sodomy is in all respects affirmed.

Donnelly, C.J., Seiler, Welliver, Morgan, Higgins, and Bardgett, JJ., concur; Rendlen, J., concurs in part and dissents in part in separate opinion filed.

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. EDDIE GREER, *Appellant.*	No. 63150

OPINION CONCURRING IN PART AND DISSENTING IN PART

I join the majority in its affirmance of appellant's convictions for two counts of kidnapping, two counts of rape, and two counts of sodomy. However, I dissent to that portion of the majority opinion reversing appellant's convictions for armed criminal action for the same reasons set forth in my dissenting opinion in State v. Haggard, No. 62227, decided this date.

ALBERT L. RENDLEN, Judge

Clerk of the Supreme Court

STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102

THOMAS F. SIMON
Clerk

TELEPHONE
(314) 751-4144

July 29, 1981

Mr. Steven W. Garrett
Assist. Attorney General
P. O. Box 899
Jefferson City, MO 65102

In re: State of Missouri vs. Eddie Greer No. 63150

Dear Mr. Garrett:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Respondent's Motion for rehearing overruled".

Very truly yours,

THOMAS F. SIMON
Clerk.

cc: Mr. James Fletcher

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI,
Respondent,

vs.

HAROLD HAWKINS,
Appellant.

No. 63149

APPEAL FROM THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

Honorable James A. Moore, Judge

Reexamination on order of the
United States Supreme Court

PER CURIAM:

This case together with several others[1] was ordered reexamined in light of Albernaz v. United States, 450 U.S.

---

[1]*See* State v. Counselman, 603 S.W.2d 3 (Mo.App. 1980); State v. McGee, 602 S.W.2d 709 (Mo.App. 1980); State v. Payne, 607 S.W.2d 822 (Mo.App. 1980); State v. White, 610 S.W.2d 646 (Mo.App. 1980); State v. (Johnny) Williams, 610 S.W.2d 644 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Counselman, ____ U.S. ____, 101 S.Ct. 1690, 68 L.Ed.2d 190 (March 23, 1981). *See* Brown v. State, 607 S.W.2d 801 (Mo.App. 1980); State v. Collins, 607 S.W.2d 781 (Mo.App. 1980); State v. Hawkins, 608 S.W.2d 496 (Mo.App. 1980); State v. (Eddie) Greer, 609 S.W.2d 423 (Mo.App. 1980); State v. Martin, 610 S.W.2d 18 (Mo.App. 1980), all of which were vacated and remanded to the

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——, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). Since all of the courts of appeals rulings were based upon our ruling in State v. Sours, 593 S.W.2d 208 (Mo. banc 1980) (Sours I) or State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), the cases were all ordered transferred to this Court. Our examination of the double jeopardy issue made in light of *Albernaz* pursuant to the orders of the United States Supreme Court, appears in State v. Haggard, —— S.W.2d —— (Mo. banc No. 62227), decided July 14, 1981.

The original opinion filed by the Missouri Court of Appeals, Western District, State v. Hawkins, 608 S.W.2d 496 (Mo.App. 1980), is approved and affirmed and by reference made a part of this opinion. State v. Sours, 603 S.W.2d 592 (Mo. banc 1980) (Sours II), *cert. denied,* Missouri v. Sours, 101 S.Ct. 2935, (1981); and State v. Haggard, —— S.W.2d ——, (Mo. banc No. 62227), decided July 14, 1981.

Footnote continued

Court of Appeals, Western District, in Missouri v. Brown, —— U.S. ——, 101 S.Ct. 1735, 68 L.Ed.2d 222 (March 30, 1981). *See* State v. Sinclair, 606 S.W.2d 271 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Southern District, in Missouri v. Sinclair, —— U.S. ——, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. Lowery, 608 S.W.2d 445 (Mo.App. 1980), vacated and remanded to the Court of Appeals, Eastern District, in Missouri v. Lowery, —— U.S. ——, 49 U.S.L.W. 3911 (June 8, 1981). *See* State v. (Timothy) Crews, 607 S.W.2d 759 (Mo.App. 1980); State v. (Terry) Crews, 607 S.W.2d 729 (Mo.App. 1980); State v. Helton, 607 S.W.2d 772 (Mo.App. 1980); State v. Tunstall, 607 S.W.2d 809 (Mo.App. 1980), all of which were vacated and remanded to the Court of Appeals, Eastern District in Missouri v. Crews, —— U.S. ——, 49 U.S.L.W. 3953 (June 22, 1981). In all of the above cases where an application for transfer to this Court was requested, all such applications were denied.

See State v. (Donald) Greer, 605 S.W.2d 93 (Mo. 1980); State v. Kendrick, 606 S.W.2d 643 (Mo. 1980); and State v. (Rollan Anthony) Williams, 606 S.W.2d 777 (Mo. 1980), all of which were vacated and remanded to this Court in Missouri v. Greer, —— U.S. ——, 49 U.S.L.W. 3882 (May 26, 1981).

The conviction for armed robbery is affirmed; the conviction for armed criminal action is reversed.

Donnelly, C.J., Seiler, Welliver, Morgan, Higgins, and Bardgett, JJ., concur; Rendlen, J., concurs in part and dissents in part in separate opinion filed.

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. HAROLD HAWKINS, *Appellant.*	No. 63149

OPINION CONCURRING IN PART AND DISSENTING IN PART

I join the majority in its affirmance of appellant's conviction for armed robbery. However, I dissent to that portion of the majority opinion reversing appellant's conviction for armed criminal action for the same reasons set forth in my dissenting opinion in State v. Haggard, No. 62227, decided this date.

ALBERT L. RENDLEN, Judge

Clerk of the Supreme Court
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102

THOMAS F. SIMON
Clerk

TELEPHONE
(314) 751-4144

July 29, 1981

Mr. Steven W. Garrett
Assist. Attorney General
P. O. Box 899
Jefferson City, MO 65102

In re: State of Missouri vs. Harold Hawkins No. 63149

Dear Mr. Garrett:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Respondent's Motion for rehearing overruled".

Very truly yours,

THOMAS F. SIMON
Clerk.

cc: Mr. James Fletcher

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI,
Respondent,

vs.

CARL FLETCHER,
Appellant.

No. 62049

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
SIXTEENTH JUDICIAL CIRCUIT, DIVISION NO. 16

HONORABLE WILLIAM J. PETERS, JUDGE

PER CURIAM:

This is a direct appeal from the Circuit Court of Jackson County where appellant was convicted of kidnapping, rape, robbery first degree, and armed criminal action. He was sentenced to fifteen years each for the kidnapping and rape convictions, thirty years for robbery, and life imprisonment for armed criminal action. It is the sentence for armed criminal action that provides this Court with exclusive appellate jurisdiction. Mo. Const. art. V, § 3.

As appellant does not challenge the sufficiency of the evidence to support his convictions, it suffices to say that the state's evidence showed that appellant was one of two black males who approached the victim's van as the victim and her eight-year-old daughter left a dance class, and who asked for a ride under the guise of needing gasoline for their motorcycle. When the victim consented to this

request, one of the men pulled a gun, and told the victim that if she made a false move, she would be killed. The robbery, rape, and kidnapping charges arose from incidents occurring in the van later that evening as the victim was forced to drive around Kansas City. The armed criminal action charge stemmed from the rape.

Appellant first maintains that under Sours v. State, 593 S.W.2d 208 (Mo. banc 1980), *vacated*, Missouri v. Sours, 446 U.S. 962 (1980), *on remand* Sours v. State, 603 S.W.2d 592 (Mo. banc 1980), *cert. den.*, Missouri v. Sours, ____ U.S. ____ (January 26, 1981), his armed criminal action conviction must be reversed. Appellant is correct.

Appellant next alleges error in the submission of several instructions charging appellant with acting in concert with another. The particular instructions complained of were:

No. 11: "As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

"First, that on or about May 17, 1979 a certain person with the aid or attempted aid of defendant committed the offense of kidnapping of Rose Mary Davis, and

"Second, that the defendant, either before or during the commission of the offense of kidnapping with the purpose of promoting its commission aided such other person in committing that offense, and

"Third, that on or about May 17, 1979 in the County of Jackson, State of Missouri, the defendant or a certain person removed Rose Mary Davis from 6614 Blue Ridge Blvd., and

"Fourth, that such removal was without the con-

sent of Rose Mary Davis by means of forcible compulsion, and

"Fifth, that the defendant or a certain person removed Rose Mary Davis for the purpose of facilitating the commission of rape,

then you will find the defendant guilty under Count I of kidnapping.

"However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

"If you do find the defendant guilty under Count I of kidnapping, you will assess and declare the punishment at imprisonment for a term of years fixed by you but not less than five years and not to exceed fifteen years."

No. 12: "As to Count I, if you do not find and believe from the evidence beyond a reasonable doubt that on or about May 17, 1979 in the County of Jackson, State of Missouri, the defendant or a certain person removed Rose Mary Davis from 6614 Blue Ridge Blvd., you must find the defendant not guilty under Count I of kidnapping."

No. 15: "As to Count III, if you find and believe from the evidence beyond a reasonable doubt:

"First, that on or about May 17, 1979 a certain person, armed with a deadly weapon, with the aid or attempted aid of defendant committed the offense of robbery in the first degree of Rose Mary Davis, and

"Second, that the defendant, either before or during the commission of the offense of robbery

in the first degree with the purpose of promoting its commission, aided such other person in committing that offense, and

"Third, that on or about May 17, 1979 in the County of Jackson, State of Missouri, the defendant or a certain person stole miscellaneous United States Currency in the charge of Rose Mary Davis, and

"Fourth, that the defendant or a certain person in doing so threatened the immediate use of physical force on or against Rose Mary Davis for the purpose of preventing resistance to taking of the property, and

"Fifth, that in the course of stealing the property, the defendant or a certain person, a participant with the defendant in the crime, was armed with a deadly weapon,

then you will find the defendant guilty under Count III of robbery in the first degree.

"However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

"If you do find the defendant guilty under Count III of robbery in the first degree, then you will assess and declare the punishment at:

"1. Life imprisonment, or

"2. Imprisonment for a term of years fixed by you but no tless than ten years and not to exceed thirty years."

No. 16: "As to Count III, if you do not find and believe from the evidence beyond a reasonable doubt that on

> or about May 17, 1979 in the County of Jackson, State of Missouri, the defendant or a certain person stole miscellaneous United States Currency in the charge of Rose Mary Davis, you must find the defendant not guilty under Count III of robbery in the first degree."

Appellant argues that the insertion of the phrase "a certain person" in the instructions was error in that it tended to negate his alibi defense, *i.e.*, the jury could have accepted his defense yet still have returned a verdict on the ground that the instruction directed them to find appellant guilty if some other "certain person" committed the acts described.

We find no error in the use of the phrase "a certain person." The phrase is specifically provided for in MAI-CR 2.12. The converse instructions similarly conform. We note also that instructions 11 and 15 required the jury to find not merely that another certain person committed the offense, but that the appellant aided or attempted to aid that other person. Moreover, the jury was instructed on appellant's alibi defense and it is axiomatic that in determining whether a particular instruction is erroneous, all instructions must be read together. State v. Sallee, 436 S.W.2d 246, 252 (Mo. 1969).

Appellant's third point is that the trial court erred in substituting an alternate juror for a principal juror who, as it turned out was only temporarily unavailable at the start of the trial. Appellant maintains that § 494.065, RSMo 1978, which provides for the replacement by alternate jurors of jurors who "become or are found to be unable or disqualified to perform their duties," requires more than mere temporary unavailability before a juror can be replaced. Without deciding this contention, relief cannot be granted where appellant has failed to demonstrate how he was prejudiced by the trial court's action. Williams

v. State, 558 S.W.2d 671, 675 (Mo.App. 1977). Appellant contends that the substitution of the alternate juror "tainted" the "integrity of the principally selected jury, one agreeable to both parties * * * ." We disagree. Section 494.065 specifically requires that alternate jurors be selected in the same manner, have the same qualifications, and be subject to the same examination as principal jurors. We find no reversible error in the substitution of the juror in this case.

Appellant next complains of the introduction into evidence of a photograph of appellant taken after a traffic arrest on the day following the incidents for which appellant was convicted in this case. Appellant argues that since the victim testified at trial that the photograph was not one she had looked at when identifying the appellant for the police, but was only similar to photographs she had looked at, the photograph was not relevant. The trial court abused its discretion, appellant contends, by admitting the photograph which tended to show a prior police record. In State v. Crossman, 464 S.W.2d 36, 41 (Mo. 1971), Division II of this Court held that the admission of "mug shots" of the defendant where those portions of the pictures containing police information such as serial numbers were blacked out was not prejudicial. In this case, the photograph contained none of this type of information to begin with. Whether relevant or not, we fail to see how the introduction of the photograph of appellant was prejudicial and amounted to a clear abuse of the trial court's discretion.

During the trial, the victim testified that one of her two assailants was riding an unusual gold motorcycle. Appellant contends that the trial court erred in admitting the testimony of a police officer who testified that the police had located a motorcycle which matched the victim's description and discovered that it belonged to a relative of appellant's. Appellant claims that the officer's testimony

that the relative told police he loaned the motorcycle to appellant—evidence crucial, appellant says, to linking appellant to the motorcycle—was prejudicial hearsay.

"Admission of objectionable hearsay evidence will not constitute reversible error if, as a matter of law, it can be concluded that such hearsay is merely cumulative to other evidence fully proving the issue." State v. Mills, 521 S.W.2d 495, 497 (Mo.App. 1975). We can make such a conclusion here, as the victim identified a state's exhibit as a picture of the motorcycle she saw the night of the crimes and a police officer testified that the same exhibit was a photograph of the motorcycle appellant was riding when arrested, and that the photograph was taken at the appellant's relative's house.

The judgment is reversed as to the armed criminal action conviction and affirmed as to the rape, robbery, and kidnapping convictions.

Donnelly, C.J., Seiler, Welliver, Morgan,
Higgins and Bardgett, JJ., concur;
Rendlen, J., concurs in part and
dissents in part in separate opinion filed.

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. CARL FLETCHER, *Appellant.*	No. 62049

OPINION CONCURRING IN PART AND DISSENTING IN PART

I join the majority in its affirmance of defendant's convictions for kidnapping, rape and robbery first degree. However, I dissent to that portion of the majority opinion reversing defendant's conviction of armed criminal action for the same reasons set forth in my dissenting opinion in *State* vs. *Haggard,* No. 62227, decided this date. It should be noted that the sentence imposed for defendant's armed criminal action conviction was life imprisonment, while the punishments assessed on the other crimes were 15 years each for rape and kidnapping and 30 years for robbery.

ALBERT L. RENDLEN, Judge

Clerk of the Supreme Court

STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102

THOMAS F. SIMON
Clerk

TELEPHONE
(314) 751-4144

July 29, 1981

Mr. Steven W. Garrett
Assist. Attorney General
P. O. Box 899
Jefferson City, MO 65102

In re: State of Missouri vs. Carl Fletcher No. 62049

Dear Mr. Garrett:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Respondent's Motion for rehearing overruled".

Very truly yours,

THOMAS F. SIMON
Clerk.

cc: Mr. Lee Nation

SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, *Respondent,* vs. HANSFORD GASKIN, *Appellant.*	No. 61433

APPEAL FROM THE CIRCUIT COURT OF
ST. LOUIS CITY

THE HONORABLE RICHARD J. MEHAN, JUDGE

Hansford Gaskin[1] was found guilty by a jury of robbery, first degree; armed criminal action based on the use of a dangerous and deadly weapon in the commission of the robbery; and assault with intent to kill with malice aforethought. The court imposed a sentence of life imprisonment for robbery, and a sentence of three years for armed criminal action, the sentences to run consecutively. It also imposed a sentence of life imprisonment for the assault to be served consecutively with the previous two sentences.

Appellant does not challenge the sufficiency of the evidence as to any of the charges. It is sufficient to state that a jury reasonably could find from the evidence that on November 10, 1976, by use of a pistol, appellant took

[1]This is the spelling of appellant's name on the notice of appeal. Counsel states the correct spelling is Hanford Gaskin.

from Dennis Purdy a pouch containing some money and some papers, and then as Mr. Purdy attempted to leave, appellant shot him in the back of the neck with the pistol.

By his first point appellant contends the court erred in admitting "testimony concerning line-up identification * * * and in Court identification" because, as he asserts, (a) the line-up identifications were conducted without counsel, (b) were unduly suggestive, (c) were tainted by prior unduly suggestive photograph displays, and (d) the in-court identification was not based on sufficient independent recollection to overcome said undue suggestion.

On November 10, 1976, Roosevelt Manuel was in his store located at 914 Academy in the City of St. Louis, and with him were Dennis Purdy, the victim of the robbery and assault; Joseph Jurdy, his father; and Silas Hardiman, a police officer not in uniform. A person, subsequently identified as appellant, entered the store, spoke to Dennis Purdy, and the two left the store. A few minutes later, Dennis Purdy re-entered the store, fell to the floor, and stated that he had been shot. Officer Hardiman ran from the store and searched the neighborhood for the assailant, but did not find him. At trial he identified appellant, without objection, as the person who entered the store, spoke to Dennis Purdy, and then left with him. About a year after the assault and robbery two police officers arrested Roosevelt Manuel for an assault which was unrelated to the incident on November 10, 1976. While Manuel was at the police station he identified a photograph of appellant. According to Manuel he was casually looking at some photographs on the wall, and Officer Nash asked him if he recognized anyone in those photographs. Manuel referred to the photograph of appellant and said, "[t]hat's the person that came in and got Dennis Purdy the night he got shot." Officer Nash testified he had been conducting an investigation as to the whereabouts of appellant who was

wanted for murder and for flourshing a deadly weapon, but that at that time he had no knowledge of the shooting incident at Manuel's store. Officer Nash stated that when he noticed that Manuel was looking at photographs on the wall, he pointed to the photograph of appellant and asked him if he had "seen this guy in the neighborhood?" Manuel replied, "[t]hat's the guy that shot Dennis Purdy * * *." On the following day Officer Nash and another officer went to the home of Dennis Purdy and showed him four photographs. He "tentatively" identified the photograph of appellant, and he stated that the photograph showed a long, heavy scar but he was not certain that the person who robbed him had such a scar because the robber wore a knit cap which covered part of his head. About two weeks later appellant was placed in a lineup and Dennis Purdy identified appellant in that lineup as the person who robbed him. Appellant was later placed in another lineup and Roosevelt Manuel identified appellant. At trial Dennis Purdy testified that appellant was the person who robbed him and Roosevelt Manuel testified that appellant was the person who came into his store and then left with Dennis Purdy.

At the time appellant was placed in a lineup he had not been charged by indictment or information with any of the offenses for which he was tried. The exclusionary rule mandated by United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) and Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967) applies only to post indictment-information lineups and not to lineups conducted prior to the commencement of formal criminal prosecution. Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972); State v. Quinn, 594 S.W.2d 599 (Mo. banc 1979). There is no merit to appellant's contention that the lineup identification was improper because appellant did not have counsel present.

Appellant's next contention, that the lineups were "unduly suggestive," is equally without merit. The trial court found the lineups not to have been unduly suggestive, and on review we are limited to a determination of whether the evidence was sufficient to sustain the trial court's finding. State v. Duncan, 540 S.W.2d 130 (Mo.App. 1976); State v. Tippett, 588 S.W.2d 742 (Mo.App. 1979). A photograph of each lineup was introduced in evidence, but neither exhibit has been lodged with this Court. Appellant makes no effort to demonstrate why the lineups are claimed to have been suggestive. The record shows that at no time did the police officers indicate to Manuel or to Dennis Purdy who should be identified in the lineup. There is nothing in the record to indicate that by reason of the composition of the lineups or because of the manner in which they were conducted either lineup was suggestive.

Next, appellant asserts that the lineups were "tainted" by "prior unduly suggestive photograph displays." This is not borne out by the record. At most the record shows, as Manuel testified, that he saw a photograph of appellant on the wall with photographs of other persons and he identified that person as the one who came into his store, or as Officer Nash testified, that when asked if he had seen appellant in the neighborhood, Manuel volunteered the information that he was the one who "shot Dennis Purdy." Four photographs were shown to Dennis Purdy, and he identified one as being a photograph of the person who had shot him. The four photographs were introduced in evidence and the trial court viewed them, but they have not been filed in this Court. We find nothing in the record to indicate that there was anything suggestive in the use of these photographs.

The final contention is that the in-court identifications were not based on "sufficient independent recollection to overcome said undue suggestion." First, we find no "undue

suggestion" or improper identification procedure. Dennis Purdy had a face-to-face encounter with appellant and talked to him. He certainly had an adequate opportunity to form an impression of his features. Mr. Manuel saw him enter his store, talk to Dennis Purdy and leave. He also testified that he had seen him frequently in the neighborhood. This contention is totally without merit.

Appellant's second point is that the trial court erred in admitting into evidence the leather coat, which was worn by Dennis Purdy when he was shot and which contained a bullet hole in the collar, because it was "not disclosed" as required by Rule 25.03(6) and thus constituted "unfair surprise."

Rule 25.03(a) provides that "[e]xcept as otherwise provided in these Rules as to protective orders, the state shall, upon written request of defendant's counsel, disclose to defendant's counsel such part or all of the following material and information within its possession or control designated in said request: * * * (6) Any * * * objects, which the state intends to introduce into evidence at the * * * trial * * *."

At the time the coat was offered in evidence appellant's counsel objected because it had "never been disclosed to the defendant as a part of his request for discovery," and he then asked "that it be excluded on that basis." The transcript before us does not contain a written request for disclosure. Therefore, we cannot determine whether the request made, and apparently some form of request was made, included such objects as the coat. Appellant argued in support of his objection that if he had known about the coat he would have wanted "an opportunity to look at the coat, examine it," but after the coat was offered in evidence no request for such an opportunity was made to the trial court.

We cannot say with certainty that the failure to disclose the intent to introduce the coat in evidence was a violation of the discovery rules, but assuming that it was, the decisive question is whether the failure to disclose resulted in fundamental unfairness or prejudice to appellant. State v. Moten, 542 S.W.2d 317, 320 (Mo.App. 1976); State v. Smothers 605 S.W.2d 128 Mo. banc 1980). When noncompliance with an applicable discovery rule is called to the attention of the court, the trial court is given the discretion to "order * * * disclosure * * *, grant a continuance, exclude such evidence, or enter such other orders as it deems just under the circumstances." Rule 25.16. The only claim of harm made to the trial court resulting from the nondisclosure was that appellant would want to look at and examine the coat, but as noted, he made no request for time to do so. Instead, he limited his request that the coat be excluded from evidence. Under these circumstances we cannot say that the failure to disclose the intention to introduce the coat in evidence resulted in fundamental unfairness or prejudice to appellant, or that the trial court abused its discretion in permitting the coat to be admitted into evidence.

Appellant next asserts that the trial court erred in permitting Dennis Purdy to testify "to the specifics of threats made to him by individuals coming to his home and a fire bombing of his home" because said testimony contained "hearsay statements," and "evidence of another crime," and were "generally inadmissible and prejudicial t[o] [his] rights to a fair trial."

Dennis Purdy, who was called as a witness by the State, testified on direct examination that he identified appellant as the person who robbed and then shot him, but he made no mention of threats to him or of a fire bombing of his house. On cross-examination, in answer to questions asked of him by appellant's counsel, he testified

that at one time he had a "change of heart" about his identification of appellant as the one who shot him because he and his wife had been getting "threatening phonecalls," he had received "threatening phonecalls on the job," and he "also got a fire bomb thrown in [his] house just to get [him] not to testify." It was further brought out on cross-examination that Dennis Purdy had gone to the prosecutor and told him of the threats and said he wanted to "get from under this case." He also testified on cross-examination that he then went to the appellant's counsel and executed an affidavit to the effect that he had been mistaken in his identification of appellant. Then, on re-direct examination he testified that after he had executed the affidavit he was contacted by the prosecutor and went to the prosecutor's office, and that as he said, he "decided to tell the truth." He was then asked on re-direct examination about an incident that happened the night before the preliminary hearing, and appellant's counsel interrupted "to make an objection and an offer of proof." Counsel for appellant then stated that the witness was going to testify about two men coming to his house telling him not to testify against appellant. The court reminded appellant's counsel that "before we began the trial we were aware that this problem was going to surface," and that counsel had been advised that if he "opened the door" by placing the affidavit of appellant before the jury, the court was going to "permit the State to come in and rehabilitate that witness by its examination as to the state of mind of the witness when he made the affidavit."

Dennis Purdy then testified on re-direct examination that on the night before appellant's preliminary hearing "two guys" unknown to him came to his door, asked for him, and said "[w]e want to offer you some money not to testify" and then "threatened" him, and said "[i]f you appear in court you'll find out." He did not testify

on re-direct examination to a fire bombing of his house except to say without objection, that the incident was reported to the police. Other than that the total testimony of a fire bombing was previously brought by appellant on cross-examination.

When we examine the circumstances it is apparent that appellant sought to impeach the testimony of Dennis Purdy as to his identification of appellant as the one who robbed and shot him by showing that prior to trial he had a "change of heart" as to his identification and had made an inconsistent statement in the form of an affidavit in which he asserted that his identification was in error. The essential question is whether, after this was brought out by appellant on cross-examination, the State was entitled to attempt to rehabilitate its witness by showing his state of mind or the reason for the "change of heart" that caused him to make a prior statement inconsistent with his testimony, and if so, was it permissible to show specific occurrences which brought about the change of heart?

The general rule, as stated in 98 C.J.S. Witnesses § 419(c) and (d), is that "[o]n redirect examination a witness may properly be interrogated as to facts, circumstances, or any matter tending to refute, weaken, or remove inferences, impressions, implications or suggestions which might result from testimony or inquiries or cross-examination, although the facts brought out may be prejudicial to the other party," and "[w]here there is a real or apparent inconsistency in the testimony of a witness, he may be questioned on redirect examination to straighten out the inconsistency, * * *." See also State v. McKinney, 475 S.W.2d 51 (Mo.App. 1971).

To what extent rehabilitation of a witness should be permitted lies primarily in the discretion of the trial court. On direct examination Dennis Purdy identified ap-

pellant as his assailant. On cross-examination he admitted that at one time he previously had had a "change of heart" and had stated that he was mistaken in his identification. It was appellant who brought out that the witness had had the "change of heart," and it was proper for the State to show on re-direct the reason therefor, and it was within the trial court's discretion to determine to what extent the specific acts of harassment could be shown in order to show the reason for the change. We find no abuse of discretion in this case.

Appellant relies on State v. Talbert, 454 S.W.2d 1 (Mo. 1970); State v. Holbert, 416 S.W.2d 129 (Mo. 1967); State v. Lee, 486 S.W.2d 412 (Mo. 1972); and United States v. Moss, 591 F.2d 428 (8th Cir. 1979). None of these cases pertain to the right of the State to rehabilitate an impeached witness by showing why he made the inconsistent statements.

Appellant's fourth point is that the trial court erred in overruling his request for a continuance so that he could "retain other counsel," and in requiring appellant's counsel to represent him when there was a "conflict between [appellant] and the Defense Attorney."

On the morning the case was set for trial and after the court announced it was ready "to call over a jury," appellant personally stated that he "would like him [his retained counsel] to withdraw." In response to a question by the court, appellant's counsel stated that appellant had indicated to him only that morning that he wanted him to withdraw as counsel. Appellant stated to the court: "I don't believe Mr. Thomas [his counsel] has adequately represented me in this charge as far as pretrial proceedings and whatever, * * * and if he can't adequately defend me before trial I don't see how he can be of any use during trial." Appellant stated that he had tried to call

his attorney without success, but had not written to him. Although the court displayed extreme patience and repeatedly requested appellant to be specific as to his complaints, the substance of appellant's complaint may be summarized by his answer that "[m]y main complaint is that I don't feel as though he adequately represented me." The only specific thing mentioned by appellant was that although his counsel had filed a motion to suppress identification testimony, which motion was then pending, he believed that he "should have filed that when these charges were brought to his attention over a year ago." Appellant's counsel advised the court that he had filed the motion after a previous trial, which resulted in a mistrial, because he had "found out that the identification was in some degree suggestive." When the court asked appellant if the "only thing you're objecting to is the failure to file that motion" at the first trial, he replied "No, I'm objecting to his representation of me solely pertaining to this charge," and "I don't feel that he's lived up to the representation that I'm entitled to." Appellant's counsel advised the court that he was ready to proceed, and the court told appellant that it would afford him time to talk to his counsel and discuss any new matter with him. Appellant replied, "I don't have anything to talk over with him."

Appellant's counsel had represented him on a previous trial of this case which resulted in a mistrial, and it appears that he also represented appellant on the trial of an unrelated case which resulted in a conviction for murder, and which was then on appeal.

The granting of a continuance is within the discretion of the trial court, and every intendment in favor of the trial court's action is indulged on appeal. State v. Cheesebrew, 575 S.W.2d 218, 225 (Mo.App. 1978). Appellant's counsel had been retained by him, and his right to change

by hiring different counsel, or by seeking appointive counsel if eligible to do so, is limited to the extent that it infringes on the public's right to an effective and efficient administration of justice. State v. Jefferies, 504 S.W.2d 6 (Mo. 1974). It is only where the accused can justify the need to change counsel and can demonstrate that he was not dilatory in seeking other representation that he can be entitled to a continuance on the date set for trial in order to obtain different counsel.

Appellant relies on the statement in State v. Smith, 586 S.W.2d 399 (Mo.App. 1979), to the effect that when an accused can demonstrate an irreconcilable conflict with counsel he may be entitled to a continuance to obtain new counsel. We find no irreconcilable conflict between counsel and client here, and there is nothing to indicate that appellant's counsel was not prepared to adequately represent him. The right to change counsel cannot be used to defeat or destroy the orderly process of the administration of justice. State v. Crider, 451 S.W.2d 825 (Mo. 1970). We find no abuse of discretion in the refusal to grant a continuance.

Appellant's challenge to his conviction and sentence of imprisonment for three years under Count II of the information for armed criminal action must be sustained. Sours v. State, 603 S.W.2d 592 (Mo. banc 1980). The conviction for armed criminal action is vacated and set aside.

Appellant next asserts that he was unconstitutionally twice placed in jeopardy "due to the fact that a mistrial on the charges had previously been granted as the result of prosecutorial misconduct in playing to the jury a video taped statement of a State's witness which contained highly prejudicial statements which the witness was led to make by the prosecutor and thus the mistrial operates as a bar to a subsequent trial."

This court authorized the record to be supplemented to show the circumstances of the mistrial. From the record now before us it appears that the following occurred.

In the first trial, as in this trial, after Dennis Purdy identified appellant as the one who robbed and then shot him, appellant sought to impeach the witness by showing that he had made a prior inconsistent statement in the form of an affidavit in which he asserted that his previous identification of appellant was in error. It appears that after Dennis Purdy had made the affidavit, the prosecutor took a video taped statement from him in which he stated that what he had said in the affidavit was not correct, and in which he set forth his reasons for making the incorrect affidavit. In an effort to rehabilitate the witness the State proposed to play the video tape to the jury. Appellant objected to the use of the video tape because it was "cumulative evidence and it serves no other purpose than to prejudice defendant's right to a fair trial, and it reiterates evidence of other crimes, specifically fire bombing, threats, intimidation." Objection was also made to statements in the video tape "made by the prosecutor that are leading and suggestive to the victim * * *." A transcript of what was said on the video tape was furnished to and read by the court. After reading the transcript the court commented that "[i]t's completely leading and there's no question that it's completely threatening." There was then a comment that "[y]ou [the prosecutor] threatened him [Dennis Purdy] with perjury prosecution and threatened him with the loss of his job." This latter comment apparently was based on a statement by the prosecutor, as read by the court from the video tape transcript, made to Dennis Purdy as follows: "And you were told, among other things, that you were a young man that was relatively intelligent and had a good service record and essentially a good job, that if you were convicted of perjury for lying on the

stand, you'd wind up losing the job and, in fact, what we're going about was the fact that you were going to lie about the identification and say this wasn't the man, is that right?"[2] After further discussion and notwithstanding the above observations by the court, it subsequently ruled that it was going "to permit the video tape to be shown and full statement of counsel for the defendant to be shown, because unless I do so, the excerpts referred to by counsel by the State and counsel for the defendant in both statements would lead to nothing but confusion of the jury and I think it would be the only possible way of straightening out the confusion caused by the excerpts to let the jury hear both statements verbatim and I'm going to do that."[3] The video tape was then played before the jury. Appellant immediately moved for a mistrial for the reason "that evidence of other crimes [has] been brought out that flagrantly places defendant's right to a fair trial in jeopardy on the grounds, specifically, that the evidence of other crimes was mentioned about the fact of the murder [charge] that was currently pending against [appellant] which had [not] been brought out before this about any murder, and on this basis I ask the Court to declare a mistrial." The prosecuting attorney attempted to justify the use of the video tape on the basis that it was material to the issue of the "state of mind" of Dennis Purdy. Apparently it was his contention that knowledge on the part of Dennis Purdy that appellant was charged with murder in an unrelated case would be material to explain why he made the affidavit inconsistent with his testimony. The trial court sustained the motion of appellant and granted

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[2]This is not the precise language contained in the transcript of the video tape, but the variances are insignificant.

[3]We cannot determine of what the "excerpts" consisted, but we assume they were taken from the video tape and the affidavit. We do not know what is referred to by "full statement of counsel for the defendant."

a mistrial. In doing so it commented that "[t]here was a statement in there that was completely not admissible" which was "with respect to a pending murder charge against [appellant]."[4] Thus the mistrial was granted at the express request of appellant and for the precise reason advanced by him.

The Double Jeopardy Clause of the Fifth Amendment protects a defendant in a criminal proceeding against multiple punishments or repeated prosecutions for the same offense.[5] Since the early case of United States v. Perez, 9 Wheat 579, 6 L.Ed. 194, it has been the established rule that whether under the Double Jeopardy Clause there can be a new trial after a mistrial has been declared without the defendant's request or consent depends on whether "there is a manifest necessity for the [mistrial], or the ends of public justice would otherwise be defeated." See also, Illinois v. Somerville, 410 U.S. 458, 93 S.Ct. 1066, 35

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[4]The reference to the murder charge was as follows:

"Q [Mr. Rogers, prosecutor] Well, • • • you know we can give you as much help as possible. We can send a police out there. We can talk to every member of the family that we know about. But we just—this man just cannot be let out on the street. He has got a murder charge pending.

"A I understand.

"Q And he has this case pending. And to be quite frank with you the people involved in the murder case are not nice people. They are people with criminal records in terms—victims I am talking about. They are just about as bad as the defendant. You are an outstanding citizen yourself. You are intelligent and after our talk earlier late in the late part of June, there is no doubt in my mind that you are positive about your identification but it's just the fear for the safety of your family that has made you do that?

"A Exactly."

[5]The provision of Art. I, § 19 Constitution of Missouri that "nor shall any person be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury," does not strictly apply since appellant was not acquitted by a jury, but the Double Jeopardy Clause of the Fifth Amendment was held to be applicable to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

L.Ed.2d 425 (1972); United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1970); United States v. Scott, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978); and State v. Aguilar, 478 S.W.2d 351 (Mo. 1972). But as stated in United States v. Dinitz, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1975), "[d]ifferent considerations obtain, however, when the mistrial has been declared at the defendant's request." It was stated in United States v. Martin, 561 F.2d 135 (8th Cir. 1977) that "[t]he Double Jeopardy Clause generally would not stand in the way of reprosecution where the defendant has requested a mistrial." See also United States v. Tateo, 377 U.S. 463, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964); Lee v. United States, 432 U.S. 23, 97 S.Ct. 2141, 53 L.Ed.2d 80 (1977); Madison v. State, 533 S.W.2d 252 (Mo. App. 1976); State v. Irving 559 S.W.2d 301 (Mo.App. 1977). The reasons for the distinction were set forth in United States v. Jorn, as follows:

> "If that right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial. Thus, where circumstances develop not attributed to prosecutorial or judicial overreaching, a motion by the defendant for a mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error."

In United States v. Dinitz, it is further stated that "[t]he distinction between mistrials declared by the court *sua sponte* and mistrials granted at the defendant's request or with his consent is wholly consistent with the protections of the Double Jeopardy Clause. Even when judicial or prosecutorial error prejudices a defendant's

prospects of securing an acquittal, he may nonetheless desire 'to go to the first jury and, perhaps, end the dispute then and there with an acquittal.' * * * Our prior decisions recognize the defendant's right to pursue this course in the absence of circumstances of manifest necessity requiring a sua sponte judicial declaration of mistrial. But it is evident that when judicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if a reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial has objectives not unlike the interests served by the Double Jeopardy Clause—the avoidance of the anxiety, expense, and delay occasioned by multiple prosecution."

The United States Supreme Court has recognized limited circumstances where a defendant's mistrial request does not remove the Double Jeopardy bar. United States v. Martin, supra. For example, the Double Jeopardy Clause protects a defendant against a governmental maneuver to cause a mistrial which allows the prosecution to strengthen its case. Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963). It also bars retrials where the underlying error is "motivated by bad faith or undertaken to harass or prejudice" the defendant. United States v. Dinitz, supra. Thus, when there results a "prosecutorial overreaching," United States v. Jorn, supra, the interests protected by the Double Jeopardy Clause outweigh society's interest in conducting a second trial ending in acquittal or conviction. United States v. Wilson, 534 F.2d 76 (6th Cir. 1976).

Appellant's point is limited to "prosecutorial misconduct" resulting from "playing to the jury a video taped

statement * * * which contained highly prejudicial statements which the witness was led to make by the prosecutor." We note here that this was not the reason advanced by appellant when the mistrial was requested, and it is not the reason set fourth by the trial court for granting a mistrial. Nowhere in the point nor in argument under the point does appellant set forth what he considers to constitute the "highly prejudicial" statements the witness was led to make. Also, we find nothing in the point to the effect that the error which brought about the declaration of a mistrial was motivated by bad faith or was undertaken to harass appellant.

Prior to the taking of any evidence in the pending case, the trial court conducted a hearing on appellant's motion to dismiss on the grounds that to retry the case after the mistrial had been granted would constitute Double Jeopardy. The principal argument presented by appellant at that hearing was that after the mistrial was granted the State requested a continuance and endorsed additional witnesses, and that this indicated bad faith on the part of the prosecution in offering in evidence the video tape. At the conclusion of this hearing the trial court ruled that "[t]here is insufficient evidence that the prosecution acted in bad faith in this situation and the motion will be overruled and denied."

We agree with the finding of the trial court and conclude there is no basis for the contentions that the mistrial resulted from bad faith on the part of the prosecution, or that there was any intention to harass appellant. In retrospect it is evident that the use of the video tape in the previous trial was ill-advised. However, mere negligence on the part of the prosecutor, United States v. Martin, supra, or trial error not involving bad faith, United States v. Jorn, supra, will not constitute what is referred to in United States v. Dinitz, supra, as "prosecutorial

overreaching." The trial court did not err in refusing appellant's motion to dismiss based on Double Jeopardy.

Appellant's final point is that the trial court erred in not declaring a mistrial "when it came to the Court's attention that it had failed to read instruction MAI-CR 2.01 [MAI-CR 2d 2.01] to the jury in its entirety immediately after the jury was sworn."

During the jury deliberation appellant's counsel advised the court that his notes indicated that the court had failed to read the instructions mandated by MAI-CR 2d 2.01 and 2.02. However, appellant's point is limited to an alleged failure to read Instruction MAI-CR 2d 2.01. These two instructions are to be read immediately after the jury is sworn. Notes on Use MAI-CR 2d 2.01. But, it was not until after the opening statements of counsel, the taking of testimony consisting of almost 250 pages in the transcript, closing arguments of counsel, and deliberation by the jury for one hour and twenty-six minutes that counsel for appellant first indicated to the court that he had made a notation in his notes that the court had failed to read MAI-CR 2d 2.01 and 2.02. The court immediately conducted a rather extensive evidentiary hearing, and based on its memory, its notes made at the time, and the evidence received at the hearing, it found as a fact that the two instructions were properly read in their entirety. Appellant did not request a mistrial, but he apparently now contends that under the circumstances the court should have directed a mistrial without such a request.

Aside from the issue of whether by reason of the delay in calling the matter to the court's attention appellant waived the reading of MAI-CR 2d 2.01, if it was in fact not read, after a careful reading on our part of the testimony at the evidentiary hearing, it is sufficient to say that the court's finding is supported by the evidence, and

the record discloses no reason to disturb the court's finding.

The judgment as to armed criminal action is reversed and the appellant discharged as to that charge. See State v. Haggard, ____ S.W.2d ____ (Mo. banc 1981). The remainder of the judgment is affirmed.

ALDEN A. STOCKARD, COMMISSIONER

PER CURIAM: The foregoing opinion by Stockard, C., is adopted as the opinion of the court.
Welliver, P.J., Higgins and Seiler, JJ., concur.

Clerk of the Supreme Court
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102

THOMAS F. SIMON
Clerk

TELEPHONE
(314) 751-4144

July 29, 1981

Mr. Steven W. Garrett
Assist. Attorney General
P. O. Box 899
Jefferson City, MO 65102

In re: State of Missouri vs. Hanford Gaskin No. 61433

Dear Mr. Garrett:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Respondent's Motion for rehearing overruled".

Very truly yours,

THOMAS F. SIMON
Clerk.

cc: Mr. Robert C. Babione

SUPREME COURT OF MISSOURI

DIVISION TWO

STATE OF MISSOURI,
Respondent,

vs.

EDWARD H. PENNINGTON, JR.,
Appellant.

No. 61928

APPEAL FROM THE CIRCUIT COURT OF
JACKSON COUNTY

THE HONORABLE JULIAN M. LEVITT, JUDGE

Edward H. Pennington was found guilty by a jury of robbery in the first degree and of armed criminal action, and he was sentenced to imprisonment for twelve years for each offense, the sentences to be served concurrently. Appellant challenges the validity of § 552.010-030 (all statutory references are to RSMo 1978). Appellate jurisdiction is in this Court. Art. V, § 3, Mo. Const.

The sufficiency of the evidence is not challenged, and therefore the pertinent facts will be briefly stated. On September 25, 1978, appellant entered the 7-11 Store at 3906 Cent..., Kansas City, Missouri and inquired about some Allerest tablets and chewing gum. He then pointed a gun at the clerk and told her to open the cash register and give him all the money. She opened the drawer to the register and stood back. Appellant took the money from the cash register, and in doing so he activated a sur-

veillance camera. The next morning a police officer recognized appellant as the person in the picture taken by the camera. Appellant was taken into custody, and at a lineup the clerk at the 7-11 Store identified him as the robber.

Appellant was arraigned on November 2, 1978 and entered a plea of not guilty. More than six months later appellant filed an untimely (see § 552.030.2) written notice of his intention to rely on the defense of "mental disease or defect." A hearing was requested by the prosecutor at which appellant reported the result of a previously held private psychological examination in which Dr. Franklin C. Boraks determined that appellant was not a psychopath and did not have a mental defect. Appellant desired an opinion by a psychiatrist, and the trial court ordered a psychiatric examination be performed at Western Missouri Mental Health Center. The report was filed on July 11, 1979, and it stated that appellant had the capacity to proceed with the trial, and had no mental disease or defect at the time of the alleged offense. Based on this report the trial court held appellant to be competent to stand trial. Appellant's sole defense was alibi, and none of the witnesses testified that he had a "disability of mind" or a "mental disease or defect." See 552.030.7.

The precise contentions in appellant's point are not easily determined. We shall set forth the material parts of the point, but in order to give portions of the point some meaning it is necessary to change some punctuation and add some words.

> "The trial court erred in overruling appellant's motion to dismiss [which was] filed immediately before trial, at the close of State's evidence and at close of all evidence, and [in overruling his] motion for new trial, on grounds that the State's accusatory process fails to provide due process of law * * * in that the

State's Chapter 552, [pertaining to] mentally ill persons in criminal cases[,] is unconstitutionally vague and does not apply the Disability of Mind definition of "Mental disease or defect[,]' [w]hich * * * test is constitutionally certain[.] In each and every case where the State accuses a person of 'criminal offense' such as the instant case, [in order] to provide defendant with the due process of law and equal protection of the law required * * * [it is necessary] that the trial court [be] fully appraised of the constitutionally certain Disability of Mind test by being informed in appellant's motion for acquittal * * * that the State's evidence failed to afford three options to the jury. (1) Disability of Mind—in the conduct in question[.] The defendant for the most part lacked the capacity for rational conduct in regard to the criminal significance of the act; (2) Partial Disability of Mind—the defendant was for the most part rational but did not suffer a material lack of the kind; or (3) No Disability of Mind—no material lack of rationality. *The trial court erred in not instructing the jury as to the constitutionally certain Disability of Mind test as set out herein.*" (Emphasis in the appellant's brief.)

On November 25, 1980, this Court advised appellant's attorney that the above point did not comply with the rules in that it did not "briefly and concisely set out the rulings of the [trial] court which are sought to be reviewed as is required by Rule 30.06(d)." Counsel was directed to redraft the point. On December 12, 1980, appellant filed a "supplemental brief" in which he set forth what he termed "additional supplement to the points relied on." As far as correcting the noted deficiency, it added nothing to the original point, but it does include the statement by way of a conclusion that "[t]he listing of the criminal or antisocial acts makes Section [552.010] vague, unconstitutional, and

chills defendants from the use of said Chapter 552." We shall, in a most liberal exercise of judicial discretion, review those contentions we are able to glean from the point and the "additional supplement" thereto. We consider these contentions to be presented:

1. Chapter 552, and particularly § 552.010 is unconstitutional because (a) it is vague, and (b) by listing in § 552.010 the "criminal or antisocial acts" it "chills" persons charged with a crime from the use of Chapter 552.

2. Chapter 552 does not apply the Disability of Mind definition of "mental disease or defect."[1]

3. It was a denial of due process of law and equal protection of the law for the court to fail to instruct the jury as to the Disability of Mind test.

We should first note that appellant filed a written notice, but out of time, of his intent to rely on "the defense of non-responsibility for any alleged criminal conduct because as a result of mental disease or defect he did not know or appreciate the nature, quality or wrongfulness of his conduct or was incapable of conforming his conduct to the requirements of the law." At the request of

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[1]An exposition of the Disability of Mind doctrine is set forth in a book, published by the University of California Press, entitled Mental Disabilities and Criminal Responsibility by Herbert Fingarette and Ann Fingarette Hass. Appellant did not provide in his brief a definition of "Disability of Mind." But at page 200 in the book above referred to a definition of the malady is set forth as follows: "If a person's mental powers are impaired in such a way as to disable him at least to some material extent from rational control of his conduct in respect to the requirements of the criminal law, the person in that respect acts with materially *lessened* criminal responsibility. If the impairment is of such magnitude that he is in chief part so disabled, he acts in that respect *without* criminal responsibility. The generic name we propose for such a condition is 'Disability of Mind' (or occasionally 'Mental Disability,' and in the briefest form 'D.O.M.'). Where the impairment is material but not predominant, it is 'Partial Disability of Mind.'"

the prosecution a hearing was held, and as a result the trial court ordered appellant be examined at the Western Missouri Mental Health Center. The findings of the examining doctor were that appellant "does not have a mental disease or defect," that he "has the capacity to understand the procedings against him and to assist his attorney in his defense," and that "at the time of the alleged criminal conduct, [appellant] did not have a mental disease or defect, did appreciate the nature and quality of his actions and was capable of conforming his conduct to the requirements of the law."

Certain basic rules should be set forth before we attempt to evaluate appellant's contentions. The legislature is empowered to enact statutes defining criminal responsibility and standards for determination of legal insanity. Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1951); State v. McGee, 361 Mo. 309, 234 S.W.2d 587 (banc 1950); State v. Sturdivan, 497 S.W.2d 139, 143 (Mo. 1973). Pursuant to this authority the legislature of Missouri has enacted Chapter 552, RSMo 1978, and particularly §§ 552.010, 552.020 and 552.030, adopted from A.L.I. Model Penal Code, but neither the Chapter nor the sections thereof refer specifically to any particular mental disease or defect, but they consider all classifications and symptoms of mental disease. State v. Sturdivan, supra; Missouri's Mental Responsibility Law, A Symposium, 19 Mo. Bar J. 683 (Mo. 1963). A finding of competency to stand trial does not affect a defendant's ability or right to plead not guilty by reason of mental disease or defect, State v. Brizendine, 433 S.W.2d 321 (Mo. banc 1968), and even though the notice was untimely appellant can be considered to have entered such a plea in this case.

In his point, and in the argument under the point, appellant makes no attempt to demonstrate in what respect Chapter 522 is unconstitutionally vague. The doctrine of

vagueness, as applied to the definition of crimes, is that the legislature must "inform the citizen with some degree of specificity just what acts are prohibited, thus affording an 'understandable rule of conduct.' " State v. Perkins, 380 S.W.2d 433, 434 (Mo. 1964). See also State v. Smith, 431 S.W.2d 74 (Mo. 1968). We doubt, however, that the vagueness doctrine, at least as it is applied to statutes defining crimes, has any application to this case. Chapter 552 does not prohibit an accused from any conduct. It does prohibit the State from trying, convicting or sentencing any person who by reason of a mental disease lacks the capacity to understand the proceedings against him or to assist in his own defense, and as stated in Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103, 114 (1975), it "jealously guards" a defendant's right to a fair trial, and is "constitutionally adequate to protect a defendant's right not to be tried while legally incompetent." We find no merit to appellant's challenge to Chapter 522 on the ground of vagueness.

Appellant argues that he would have "spoken freely to the court [appointed] psychiatrist if [§ 552.010] had not chilled him by its vagueness, its reference to 'repeated criminal or otherwise antisocial conduct, whether or not such abnormality may be included under mental illness, mental disease or defect in some classification of mental abnormality or disorder.' " Appellant then argues that he was charged with two felonies, and had previously been convicted of robbery, and the "above definition" decides without a jury "that he cannot have the benefit of Chapter 552 even though the facts could be brought to a jury that would convince a jury by the preponderance of the evidence that he was not entitled to the benefit of the Durham rule." He concludes his argument by asserting, "[t]he Missouri statute is plainly unconstitutional for the defects given it for impermissible vagueness, for chilling appellant by

throwing the mishmash of medical, psychiatric, and social engineering words in it that need not be there."

First, there is nothing to indicate that appellant ever read or was aware of the wording of § 552.010, or that he was advised by anyone, including his lawyer, not to talk freely to the examining psychiatrist because of the language of this section. Second, the words of § 552.010 relied on by appellant as creating a chilling effect, are a part of the definition of what the terms "mental disease or defect" do *not* consist, and appellant does not attempt to demonstrate how those words when so used could create a "chilling" effect. Third, the wording of § 552.010, or the fact that the psychiatrist reported that appellant did not have a mental defect, as defined, did not result in the trial having "to proceed on its merits shorn of the defense of mental disability affecting criminal responsibility" as appellant asserts in his brief. Appellant had the right to summon and cross-examine the psychiatrist who rendered the opinion on the issue of fitness to proceed and to offer evidence upon the issue. § 552.020.6. Also, "[t]he issue of whether any person had a mental disease or defect excluding responsibility for his conduct is one for the jury to decide upon the introduction of substantial evidence of the lack of such responsibility." § 552.030.7. As previously noted, § 552.020 and § 552.030 do not refer specifically to any particular mental disease or defect. Therefore, appellant was entitled to present evidence of his own peculiar mental aberration, but he elected not to introduce any evidence regarding mental disease or defect. Instead his sole defense at trial was alibi. Appellant's contention that Chapter 552 prevented the jury from considering a defense of mental disease or defect is the result of an erroneous interpretation of § 552.030, and not because of a constitutional infirmity.

Appellant's remaining contention, as we have de-

termined it, is that it was a denial of due process and equal protection of law for the trial court to fail to instruct the jury as to the Disability of Mind test.

Appellant did not object to any of the instructions given, and did not present any assignment of error in his motion for new trial pertaining to instructions. As noted there was no evidence pertaining to his "insanity defense. In § 552.030.7 it provides that in the absence of any substantial evidence pertaining to lack of responsibility "the presumption [of freedom of mental disease or defect] shall be conclusive." In these circumstances there was no duty on the trial court to instruct the jury on what appellant calls the Disability of Mind test.

In his third point appellant asserts that the trial court erred in not suppressing a statement made by him, testified to by Police Officer Hayslett, that "appellant admitted the picture [taken by the surveillance camera] was of him but [that] he would not tell where the gun was."

This point is insufficient. It does not state wherein and why the ruling of the court was erroneous. Rule 30.06(d). As written it preserves nothing for review. Thummel v. King, 570 S.W.2d 679, 685 (Mo. banc 1978). Also this contention was not presented in appellant's motion for new trial. Objections to statements allegedly given in violation of a defendant's constitutional rights, must be properly preserved and presented to the trial court. State v. Miller, 593 S.W.2d 895, 897 (Mo.App. 1980). This issue of whether the statement of appellant should have been suppressed was presented in a pretrial motion, and after a hearing the trial court denied the motion. The testimony of Officer Hayslett at the trial was essentially the same as that at the hearing on the motion to suppress, but appellant made no objection to the testimony. For this additional reason the issue presented by the motion to suppress

is not preserved for appellate review. State v. Toliver, 544 S.W.2d 565, 568 (Mo. banc 1976). Notwithstanding the above, we have sifted through appellant's argument in an effort to determine his contentions, and shall review them as though appellant contended they constituted plain error.

At the hearing on the pretrial motion Officer Hayslett testified that he and Officer Coleman went to appellant's house. Officer Hayslett went upstairs where he met appellant and showed him the picture taken by the surveillance camera and told him that the police had "probable cause" to believe that he was "the suspect in the robbery in the picture." On the way out of the house the officer told appellant he was under arrest, and he then gave appellant his "Miranda" rights. They then entered the patrol car and the officer again gave appellant his "Miranda" rights, and appellant acknowledged that he understood them. While in the patrol car, appellant asked to again see the picture taken by the surveillance camera and Officer Hayslett showed it to him. According to Officer Hayslett appellant then "admitted to [Officer Hayslett] that it [the picture] was him, but he said that the gun that was involved, that he would not tell us about where the gun was located, where it was hidden." Officer Hayslett denied that appellant had handcuffs placed on him, and he stated that he did not question appellant about his involvement in the robbery.

Appellant testified at the pretrial hearing that the "Miranda" warnings were given only once, but that he understood them and that he knew his rights. He denied that he made any statement to Officer Hayslett, and that when Officer Hayslett asked about the robbery he replied, "I don't know what you're talking about." He also testified that Officer Hayslett handcuffed him, and that after he entered the patrol car the handcuffs were removed and the officer explained that the removal would make it more

comfortable for the ride downtown. Although appellant denied that he made any statement, his argument in his brief is that the removal of the handcuffs constituted an inducement to obtain the statement.

The review by this Court of the trial court's failure to suppress the statement of appellant as testified to by Officer Hayslett is limited to the finding of manifest injustice or a miscarriage of justice, and we conclude that the court properly overruled the motion to suppress.

Appellant's fourth and last point is that the trial court erred in "admitting testimony of line up identification in absence of appellant's counsel, * * * and it [the lineup] was unduly suggestive and conducive to irreparable misidentification * * *."

This point also is inadequate in that it does not set forth the ruling or action of the trial court sought to be reviewed and wherein and why it is contended to be erroneous. Rule 30.06(d).

Strictly construed, appellant's contention is that counsel was not present when the identification testimony was admitted at trial. The record disputes this. We cannot determine from the record the precise date appellant was first charged by indictment or information, but the lineup was held on September 26, 1978, and it affirmatively appears that the charge was filed thereafter. In the event appellant intended to refer to holding of the lineup without counsel present, there was no requirement that counsel be present. State v. Quinn, 594 S.W.2d 599 (Mo. banc 1980).

We note that the victim of the robbery positively identified appellant at trial without objection, and she was permitted to testify that she picked appellant out of the lineup without any objection by appellant. Therefore, any challenge to the method of conducting the lineup is not

preserved for appellate review. State v. Valentine, 584 S.W.2d 92 (Mo. banc 1979); State v. Greenlaw, 593 S.W.2d 641 (Mo.App. 1980).

Appellant argues that the lineup was suggestive and conducive to irreparable misidentification because he was placed in the middle of the three-man lineup, he was the heaviest in build, and because the victim was told that if the person who robbed her was in the lineup he would not be wearing glasses.

It is unreasonable to assume that the members of a lineup would be identical in appearance, and a dissimilarity alone in the physical appearance is insufficient to establish an impermissible suggestiveness. State v. Gillum, 540 S.W.2d 167 (Mo.App. 1976); State v. Abrams, 597 S.W.2d 230 (Mo.App. 1980). As to the statement that the robber would not be wearing glasses at the lineup, there is no showing that either of the two other members of the lineup were wearing glasses. Therefore, if suggestive, the statement was equally suggestive as to all participants in the lineup. We find appellant's challenge to the lineup to be without merit.

The judgment as to armed criminal action is reversed and the appellant discharged as to that charge. State v. Haggard, ____ S.W.2d ____ (Mo. banc 1981). The remainder of the judgment is affirmed.

ALDEN A. STOCKARD, COMMISSIONER

PER CURIAM: The foregoing opinion
by Stockard, C., is adopted as the
opinion of the court.
Welliver, P.J., Higgins and Seiler,
JJ., concur.

Clerk of the Supreme Court
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102

THOMAS F. SIMON
Clerk

TELEPHONE
(314) 751-4144

July 29, 1981

Mr. Steven W. Garrett
Assist. Attorney General
P. O. Box 899
Jefferson City, MO 65102

In re: State of Missouri vs. Edward H. Pennington No. 61928

Dear Mr. Garrett:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Respondent's Motion for rehearing overruled".

Very truly yours,
THOMAS F. SIMON
Clerk.

cc: Mr. Lamar Dye

APPENDIX B

Section 560.120, RSMo 1969, reads as follows:

560.120. Robbery in first degree.—Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence, and against his will, by violence to his person, or by putting him in fear of some immediate injury to his person; or who shall be convicted of feloniously taking the property of another from the person of his wife, servant, clerk or agent, in charge thereof, and against the will of such wife, servant, clerk or agent by violence to the person of such wife, servant, clerk or agent, or by putting him or her in fear of some immediate injury to his or her person, shall be adjudged guilty of robbery in the first degree.

Section 560.135, RSMo 1975 Supp., reads as follows:

560.135. Armed robbery, punishment for.—Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon and every person convicted of robbery in the first degree by any other means shall be punished by imprisonment by the division of corrections for not less than five years; every person convicted of robbery in the second degree shall be punished by imprisonment by the division of corrections not exceeding five nor less than three years; every person convicted of robbery in the third degree shall be punished by imprisonment by the division of corrections not exceeding five years.

Section 559.225, RSMo 1976 Supp., reads as follows:

559.225. Armed criminal action—penalty—exceptions.—1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a

dangerous or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than five years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committee [sic] by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of five calendar years.

3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than ten years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of ten calendar years.

4. The provisions of this section shall not apply to the

felonies defined in sections 559.005, 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo.

Section 565.004, RSMo 1978, is as follows:

***565.004. Murder in the second degree.**—All other kinds of murder at common law, not herein declared to be manslaughter or justifiable or excusable homicide, shall be deemed murder in the second degree.

Section 559.240, RSMo 1969, is as follows:

559.240. Kidnapping.—1. If any person shall, willfully and without lawful authority, forcibly seize, confine, inveigle, decoy or kidnap any person, with intent to cause such person to be sent or taken out of this state, or to be secretly confined within the same against his will, or shall forcibly carry or send such person out of this state against his will, he shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding ten years.

2. Any person charged with such offense may be tried in any county into or through which the person so seized, inveigled, decoyed or kidnapped shall have been taken, carried or brought.

Section 559.180, RSMo 1969, read as follows:

559.180. Assault with intent to kill.—Every person who shall, on purpose and of malice aforethought, shoot at or stab another, or assault or beat another with a deadly weapon, or by any other means or force likely to produce death or great bodily harm, with intent to kill, maim, ravish or rob such person, or in the attempt to commit any burglary or other felony, or in resisting the execution of legal process, shall be punished by imprisonment in the penitentiary not less than two years.

Section 559.190, RSMo 1969, read as follows:

559.190. Felonious assault without malice aforethought.

—Every person who shall be convicted of an assault with intent to kill, or to do great bodily harm, or to commit any robbery, rape, burglary, manslaughter or other felony, the punishment for which assault is not hereinbefore prescribed, shall be punished by imprisonment in the penitentiary not exceeding five years, or in the county jail not less than six months, or by a fine not less than one hundred dollars and imprisonment in the county jail not less than three months, or by a fine of not less than one hundred dollars.

565.060, RSMo 1978: Assault in the second degree.—1. A person commits the crime of assault in the second degree if:

(1) He knowingly causes or attempts to cause physical injury to another person by means of a deadly weapon or dangerous instrument; or

(2) He recklessly causes serious physical injury to another person; or

(3) He attempts to kill or to cause serious physical injury or causes serious physical injury under circumstances that would constitute assault in the first degree under section 565.050, but

(a) Acts under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of the explanation or excuse shall be determined from the viewpoint of any ordinary person in the actor's situation under the circumstances as the actor believes them to be; or

(b) At the time of the act, he believes the circumstances to be such that if they existed would justify killing or inflicting serious physical injury under the provisions of chapter 563 of this code, but his belief is unreasonable.

2. The defendant shall have the burden of injecting the issues of extreme emotional disturbance under para-

graph (a) of subdivision (3) of subsection 1 or belief in circumstances amounting to justification under paragraph (b) of subdivision (3) of subsection 1.

3. Assault in the second degree is a class D felony.

571.015, RSMo 1978: Armed criminal action, defined, penalty.—1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than five years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of five calendar years.

3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than ten years. The punishment imposed pursuant to this subsection shall be in addition to any punishment pro-

vided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of ten calendar years.

4. The provisions of this section shall not apply to the felonies defined in sections 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo.

APPENDIX C

STATE of Missouri, Respondent,

v.

Johnny WILLIAMS, Appellant.
No. 41095.

Missouri Court of Appeals,
Eastern District,
Division Three.

March 4, 1980.

Motion for Rehearing and/or Transfer to
Supreme Court Denied April 18, 1980.

Defendant was convicted on a jury verdict before the City of St. Louis Circuit Court, Lackland Bloom, J., of assault with intent to rape with malice aforethought, armed criminal action, and carrying a concealed weapon, and he appealed from judgment and sentence. The Court of Appeals, Crist, J., held that: (1) defendant's convictions for armed criminal action, which included all of the elements of assault with intent to rape, and underlying felony of assault with intent to rape with malice aforethought, and sentence for such convictions, constituted multiple punishment for the same offense in violation of defendant's rights against double jeopardy, and (2) evidence was sufficient to support conviction of assault with intent to rape.

Affirmed in part and reversed in part.

1. Criminal Law 200(7)

Defendant's convictions for armed criminal action, which includes all of the elements of assault with intent to rape, and underlying felony of assault with intent to rape with malice aforethought, and sentences for such convic-

tions, constituted multiple punishment for the same offense in violation of defendant's rights against double jeopardy. V.A.M.S. §§ 559.180, 559.225(1) (Repealed); U.S.C.A.Const. Amends. 5, 14.

2. Rape 53(2)

Evidence, including victim's positive and unshaken story of sexual outrage, was sufficient to support defendant's conviction of assault with intent to rape. V.A.M.S. § 559.180 (Repealed).

Leonard W. Buckley, Jr., St. Louis, for appellant.

John Ashcroft, Atty. Gen., Paul Robert Otto, Asst. Atty. Gen., Jefferson City, George A. Peach, Circuit Atty., Richard G. Callahan, St. Louis, for respondent.

CRIST, Judge.

Double jeopardy case.

On October 18, 1978, defendant was convicted by a jury of the following: (1) assault with intent to rape with malice aforethought under § 559.180, RSMo 1969 (Count I); (2) armed criminal action under § 559.225, RSMo Supp.1976 (Count II); and (3) carrying a concealed weapon under § 564.610, RSMo 1969 (Count III). He was sentenced to 20 years on Count I, 3 years on Count II, and 5 years on Count III. The sentences are to run concurrently. We reverse his conviction and sentence under Count II by reason of double jeopardy. We affirm his convictions and sentences under Counts I and III.

The victim, age 15 at the time of the occurrence, January 31, 1978, had to walk 3 or 4 blocks from her bus stop to her home. While en route, defendant grabbed her and pulled her into an alley. Screaming and struggling, she was told by defendant he would kill her if she did not stop.

Defendant put a gun to her head and "clicked" it twice. The victim continued to scream and struggle. Defendant put the gun away and hit her in the jaw. Defendant tried to open her coat. He held her on the ground and asked her if she was going to have sex with him.

When Officers Morris and Hampton arrived on the scene, defendant had his arm around the victim and had her up against a wall. She broke away from defendant and ran to Officer Morris. She was hysterical and seemed to be in pain. She could not talk to him because her jaw was locked. She had scratches on her neck. When other police officers arrived, she was able to tell them defendant struck her, tried to rape her, and had a gun. She was taken to city hospital for treatment of her jaw and the scratches on her neck.

Defendant correctly argues that he has been put in double jeopardy. Although the sentences are to run concurrently, the conviction and sentence under the armed criminal action charge causes defendant to be ineligible for parole, probation or conditional release for three years.

Section 559.180, RSMo 1969, provides in pertinent part:

> Every person who shall, on purpose and of malice aforethought, shoot at or stab another, or assault or beat another with a deadly weapon, or by any other means or force likely to produce death or great bodily harm, with intent to . . . ravish . . . such person . . . , shall be punished by imprisonment in the penitentiary not less than two years.

Section 559.225(1) RSMo Supp.1976, provides in pertinent part:

> [A]ny person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of

the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years.

[1] The armed criminal action and the underlying felony of assault with intent to rape with malice aforethought are the same offense for double jeopardy purposes. Convictions and sentences for both constitutes prohibited multiple punishments. There was in law and fact only one crime. The elements of armed criminal action include all of the elements of assault with intent to rape. *Sours* v. *State*, 593 S.W.2d 208 (Mo. banc 1980). The conviction and sentence for the armed criminal action, therefore, must be reversed.

[2] Defendant questions whether the evidence was sufficient to support the conviction of assault with intent to rape. He predicates this argument on the proposition that there was such a conflict in testimony that corroborating evidence of the crime was necessary. He relies on *State* v. *Platt*, 496 S.W.2d 878 (Mo.App. 1973). We disagree. While there were some conflicts in the testimony, the victim told a positive and unshaken story of sexual outrage. Her story was entirely possible and not contrary to human experience. Accordingly, the truth of her story was for the jury to decide. *State* v. *Neal*, 484 S.W.2d 270, 272 (Mo. 1972).

We reverse defendant's conviction and sentence for armed criminal action. We affirm his convictions and sentences for assault with intent to rape with malice aforethought and for carrying a concealed weapon.

DOWD, P. J., and REINHARD, J., concur.

STATE of Missouri, Plaintiff-Respondent,

v.

Marlon PAYNE, Defendant-Appellant.
No. 40983.

Missouri Court of Appeals,
Eastern District,
Division Three.

Oct. 21, 1980.

Defendant was convicted before the Circuit Court, City of St. Louis, Richard J. Brown, J., of robbery in first degree and armed criminal action, and he appealed. The Court of Appeals, Dowd, P. J., held that: (1) armed criminal action conviction was reversed as mandated by separate decision of court; (2) where there was short period of time between commission of alleged robbery and arrest, and amount of money taken from victim was similar to amount of money found in defendant's possession at time of arrest, evidence of amount seized was relevant, and, therefore, admissible; and (3) alleged error in admitting into evidence money allegedly seized by defendant from taxi driver during alleged robbery was harmless in light of overwhelming weight of evidence.

Reversed in part; affirmed in part.

1. Larceny 64(1)

Mere possession of quantity of money is not relevant to issue of whether defendant stole money.

2. Robbery 23(1)

Where there is short period of time between commission of alleged robbery and arrest, and amount of money taken from victim is similar to amount of money found in

defendant's possession at time of arrest, evidence of amount seized is relevant, and, therefore, admissible.

3. Criminal Law 1169.1(10)

Alleged error in admitting into evidence money alleged to have been taken from taxi driver during course of alleged robbery was harmless in light of overwhelming weight of evidence.

Robert C. Babione, Defender, John Putzel, Asst. Public Defender, St. Louis, for defendant—appellant.

John D. Ashcroft, Atty. Gen., Paul Robt. Otto, Asst. Atty. Gen., Jefferson City, for plaintiff—respondent.

DOWD, Presiding Judge.

Marlon Payne, defendant herein, appeals from his conviction of robbery first degree and armed criminal action. A jury assessed his punishment at five years and three years imprisonment, terms to run concurrently.

We reverse the armed criminal action conviction as mandated by *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc 1980) *(Sours II)*. We affirm the conviction of robbery first degree.

The evidence indicates that D. L. Adams picked up the defendant and two other males in his taxi. Adams drove the three men to a location in the City of St. Louis where they instructed him to stop the cab. One of the three men got out of the cab leaving some money with the two remaining passengers. Adams informed the two passengers that they owed him $3.95. Each of them gave him $1.32 and a discussion ensued concerning the amount owed. Subsequently one of the remaining passengers later identified as Marlon Payne, the defendant, got out of the cab, pulled out a gun and demanded that Adams give him "that money". Adams gave the gunman $2.64 and was attempt-

ing to drive away when the defendant instructed him not to move or he would "blow (Adam's) head off." At that moment a police car rounded the corner and arrested the defendant who was running from the scene. The arresting officer confiscated the defendant's clothing and $3.39 from his person.

Defendant complains in his sole point on appeal that the trial court erred in allowing the $3.39 to be admitted into evidence. It is defendant's position that because the taxi driver did not identify the money as that which was taken from him it was error to admit the money into evidence. Defendant claims that this error prejudiced him in the eyes of the jury because it necessarily inferred that the money seized from him was that taken in the robbery.

[1-3] We agree with defendant that mere possession of a quantity of money is not relevant to the issue of whether defendant stole the money. *State* v. *Ball*, 339 S.W.2d 783, 786 (Mo. banc 1960). In a case such as the one we are presented with here, however, where there is a short period of time between the commission of the crime and arrest, and the amount of money taken from the victim is similar to the amount of money found in the defendant's possession at the time of arrest, evidence of the amount seized is relevant, and, therefore, admissible. *State* v. *Harris*, 539 S.W.2d 793, 794 (Mo.App.1976); *State* v. *Britt*, 504 S.W.2d 38, 42 (Mo.1974). We find no error in the admission of the money into evidence. In any event, the alleged error could have only been harmless in light of the overwhelming weight of the evidence. *State* v. *Epperson*, 571 S.W.2d 260, 268 (Mo. banc 1978). Defendant's claim of error is without merit.

The armed criminal action is reversed. The conviction of robbery first degree is affirmed.

REINHARDT and CRIST, JJ., concur.

STATE of Missouri, Respondent,

v.

Stanley G. HELTON, Appellant.
No. 42181.

Missouri Court of Appeals,
Eastern District,
Division Three.

Sept. 30, 1980.

Motion for Rehearing and/or Transfer to Supreme Court Denied Nov. 14, 1980.

Applications to Transfer Denied Dec. 15, 1980.

Defendant was convicted in the Circuit Court, Montgomery County, Edward D. Hodge, J., of robbery, and of armed criminal action and he appealed. The Court of Appeals, Crist, J., held that where defendant, accompanied by another man, entered service station, pointed shotgun at attendant, and two men took money from station's cash drawer and attendant was made to lie on floor before he was struck on head with some sort of instrument, defendant could not be convicted of both robbery in the first degree and of armed criminal action as such would violate prohibition of double jeopardy.

Reversed in part and affirmed in part.

1. Criminal Law 200(1)

Where defendant, accompanied by another man, entered service station, pointed gun at attendant, and two men took money from station's cash drawer and attendant was made to lie on floor before he was struck on head with some sort of instrument, defendant could not be convicted

of both robbery in the first degree and of armed criminal action as such would violate prohibition of double jeopardy. V.A.M.S. §§ 559.225, 560.120 (Repealed); U.S.C.A. Const. Amend. 5.

2. Criminal Law 931

Where misconduct of jurors is first presented in motion for new trial, an affirmative showing must be made that defendant and his counsel were ignorant of the impropriety until after the trial. V.A.M.S. § 546.240.

3. Criminal Law 931

Where defendant and his counsel were fully aware of communication of the bailiff with the jury at trial, defendant's failure to preserve error by objecting prior to his motion for new trial would preclude consideration of claimed error. V.A.M.S. § 546.240.

4. Criminal Law 912½

A defendant is not entitled to wait until verdict is in, thus gambling on the result, and then complain of some misconduct of a juror or some circumstance of which he had knowledge in time to present the matter to the trial court for corrective action.

Darryl L. Hicks, Warrenton, for appellant.

John Ashcroft, Atty. Gen., Paul Robert Otto, Paul M. Spinden, Asst. Attys. Gen., Jefferson City, Roy L. Richter, Pros. Atty., Montgomery County, Montgomery City, for respondent.

CRIST, Judge.

Defendant was convicted by a jury of robbery in the first degree, a felony under § 560.120, RSMo 1969, and of armed criminal action, a felony under § 559.225, RSMo.

Supp. 1976. He was sentenced, consecutively, to fifteen years on the robbery count and ten years on the armed criminal action count. We reverse in part.

On March 16, 1978, defendant, accompanied by another man, entered the Site Service Station in High Hill, Montgomery County, Missouri. Defendant pointed a shotgun at the station attendant. The two men took the money from the station's cash drawer. The attendant was made to lie on the floor before he was struck on the head with some sort of instrument.

Defendant charges error in the conviction of both offenses by reason of double jeopardy, citing *Sours* v. *State*, 593 S.W.2d 208 (Mo. banc, Jan. 1980) (*Sours I*). He is correct as to the armed criminal action sentence.

[1] By authority of *Whalen* v. *United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), the United States Supreme Court ordered *Sours I* vacated and reconsidered. Thereafter, the Missouri Supreme Court reaffired its conclusion that a conviction of both armed criminal action and the underlying felony violates the prohibition of double jeopardy. *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc, 1980) (*Sours II*). The conviction for armed criminal action must be reversed, but the robbery conviction is valid.

Defendant also charges error by reason of the communication of the bailiff with the jury. The testimony relating to his complaint is as follows:

> THE COURT: May I have the attention of counsel. The jury has just said they have a question. I am going to have them brought back into the Courtroom so they may present that to the Court.
>
> (Deputy Clemons and Court confer at bench out of hearing of Court Reporter.)

THE COURT: The jury apparently has said they do have a question as to the term "life".

MS. DEAN: I don't know what to do about that.

THE COURT: Let's bring them back in and I will speak to them.

Would you bring in the jury, please.

(The jury is then returned to the courtroom and the following proceedings are had.)

THE COURT: Ladies and Gentlemen of the Jury, I was told by the bailiff that you do have a question. I can only tell you that the instructions given you by the Court contain all of the law on this case and you must bare your verdict on those instructions.

Now, as to that question pertaining to your verdict, I can only ask that you return to the jury room and reread the instructions and see if you can arrive at a verdict.

Section 546.240, RSMo 1978 provides that the bailiff is not to speak or communicate with the jury. In *State* v. *Davis*, 462 S.W.2d 798 (Mo. 1971), our Supreme Court stated:

> . . . communications between jurors and outsiders are not proper but always the emphasis has been concerning the case in which they are sitting and innocent communications do not require the granting of a new trial. Id. at 803.

[2-4] In addition, defendant did not preserve any error by failing to object prior to his motion for a new trial. Where the misconduct of jurors is first presented in a motion for new trial, an affirmative showing must be made that defendant and his counsel were ignorant of the impropriety until after the trial. *State* v. *Bollinger*, 560

S.W.2d 606, 608 (Mo.App. 1978). The record reflects that defendant and his counsel were fully aware of the communication at trial. "A defendant is not entitled to wait until the verdict is in, thus gambling on the result, and then complain of some misconduct of a juror or some circumstance of which he had knowledge in time to present the matter to the trial court for corrective action." *State* v. *McQuerry*, 406 S.W.2d 624, 630 (Mo. 1966). A trial court must be given an opportunity to correct its errors. *State* v. *Flowers*, 597 S.W.2d 276, 277-78 (Mo.App. 1980). Defendant has failed to demonstrate "plain error" pursuant to Rule 29.12(b).

That part of the judgment of the circuit court imposing a ten year sentence on defendant for armed criminal action is reversed. That part of the judgment imposing the fifteen year sentence for first degree robbery is affirmed.

DOWD, P. J., and REINHARD, J., concur.

STATE of Missouri, Respondent,

v.

Robert Gene LOWERY, Appellant.
No. 41834.

Missouri Court of Appeals,
Eastern District,
Division Three,

Sept. 2, 1980.

Motion for Rehearing and/or Transfer to Supreme Court Denied Dec. 12, 1980.

Application to Transfer Denied Jan. 13, 1981.

Defendant was convicted in St. Louis City Circuit Court, Michael F. Godfrey, J., of first-degree robbery and armed

criminal action, and he appealed. The Court of Appeals, Crist, J., held that sentence imposed following conviction for armed criminal action as well as for first-degree robbery violated double jeopardy.

Affirmed in part, reversed in part.

Criminal Law 200(1)

Sentence imposed upon defendant following his conviction of armed criminal action, which arose out of same acts that formed basis for his conviction and sentence for first-degree robbery, violated double jeopardy, and thus could not stand. U.S.C. A.Const. Amend. 5; V.A.M.S. §§ 559.225, 560.120, 560.135 (Repealed).

Lawrence O. Willbrand, St. Louis, for appellant.

John Ashcroft, Atty. Gen., Paul Robert Otto, Steven W. Garrett, Asst. Attys. Gen., Jefferson City, George A. Peach, Circuit Atty., St. Louis, for respondent.

CRIST, Judge.

Defendant was convicted by a jury of first degree robbery and armed criminal action pursuant to § 560.120, RSMo 1969, § 560.135, RSMo Supp. 1975 and § 559.225, RSMo Supp. 1976. Defendant was sentenced consecutively under the Second Offender Act to twenty-five years for first degree robbery and twenty years for armed criminal action. Defendant appeals. We reverse in part.

On July 28, 1978, during the early evening hours, defendant and an accomplice entered Buncher's Pharmacy, St. Louis, Missouri, and asked the price of a tube of toothpaste. Immediately thereafter, defendant directed the owner at gunpoint to the rear of the pharmacy. Defendant took approximately $800.00 in cash and $250.00 in drugs.

Defendant charges that the trial court erred in sentencing him to twenty years for armed criminal action by reason of § 546.490, RSMo 1969. We agree that the trial court erred, but for a different reason than that espoused by defendant.

Although double jeopardy was not mentioned by defendant in his appeal, reference is made to the United States Supreme Court's disposition of *Sours* v. *State,* 593 S.W.2d 208 (Mo. banc 1980). By authority of *Whalen* v. *United States,* 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), the Supreme Court ordered *Sours* vacated and reconsidered. *Missouri* v. *Sours,* 446 U.S. 962, 100 S.Ct. 2935, 64 L.Ed.2d 820 (1980). Our Missouri Supreme Court reconsidered *Sours* pursuant to the United States Supreme Court's mandate.

By reason of the last mandate of our Missouri Supreme Court, *Sours* v. *State,* 603 S.W.2d 592 (Mo. banc 1980), the twenty year sentence for the armed criminal action cannot stand.

That part of the judgment of the circuit court imposing a twenty year sentence on defendant for armed criminal action is reversed. That part of the judgment of the circuit court imposing a twenty-five year sentence on defendant for first degree robbery is affirmed.

DOWD, P. J., and REINHARD, J., concur.

STATE of Missouri, Respondent,

v.

Michael L. WHITE, Appellant.
No. 41276.

Missouri Court of Appeals,
Eastern District,
Division Three.

April 8, 1980.

Motion for Rehearing and/or Transfer to
Supreme Court Denied May 19, 1980.

Defendant was convicted in the City of St. Louis Circuit Court, Thomas W. Challis, J., of robbery of first degree and armed criminal action, and defendant appealed. The Court of Appeals, Reinhard, J., held that: (1) it was not error to fail to grant mistrial when prosecuting attorney asked defendant whether he had gun in his possession at another location four days prior to robbery; (2) testimony of prosecution witness that he saw defendant with gun at service station four days before robbery was proper rebuttal to defendant's denial that he possessed gun at that time; (3) defendant's failure to object after prosecutor gave opening statement to the effect that defendant planned to take victim to victim's house and have sexual intercourse with his wife constituted waiver of issue on appeal; and (4) conviction for armed criminal action was reversed in light of Supreme Court decision, subsequent to filing of briefs, holding that convictions for robbery first degree and armed criminal action violated prohibition against double jeopardy.

Reversed in part; affirmed in part.

1. Criminal Law 706(2)

In prosecution for robbery first degree and armed crimi-

nal action, it was not error to fail to grant mistrial requested on basis that questions prosecutor asked defendant as to whether he had gun in his possession at another location four days prior to robbery constituted evidence of other criminal activity in that it was not a crime to possess a gun.

2. Criminal Law 1043(3)

On appeal from conviction, a defendant may not broaden scope of his trial objections.

3. Criminal Law 369.1

Proof of commission of separate and distinct crime is not admissible in criminal prosecution unless such proof has legitimate tendency to directly establish defendant's guilt.

4. Criminal Law 683(1)

In prosecution for robbery first degree and armed criminal action, testimony of prosecution witness that he saw defendant with gun at service station four days before robbery was proper rebuttal to defendant's denial that he possessed gun at that time; jury could not reasonably have inferred from State's rebuttal evidence that defendant had been involved in prior criminal activity.

5. Criminal Law 1037.1(2)

Defendant's failure to object, after prosecutor gave opening statement in prosecution for robbery first degree and armed criminal action, to prosecutor's statement to the effect that defendant planned to take victim to victim's house and have sexual intercourse with his wife constituted waiver of issue on appeal.

6. Criminal Law 703

When prosecuting attorney has reasonable grounds to believe that facts stated in his opening statement can be

proved, such statement is not improper, although facts are not followed with proof because evidence is either excluded or omitted.

7. Criminal Law 730(2)

Trial court is vested with wide discretion in determining whether prosecuting attorney acted in good faith in making a statement in opening statement.

8. Criminal Law 1186.1

Conviction for offense of armed criminal action was reversed in light of Supreme Court decision, subsequent to filing of briefs in prosecution for robbery first degree and armed criminal action, holding that convictions for robbery first degree with dangerous and deadly weapon and armed criminal action violated prohibition against double jeopardy. U.S.C.A. Const. Amend. 5.

Robert C. Babione, Charles H. Mostov, St. Louis, for appellant.

John D. Ashcroft, Atty. Gen., Paul Robert Otto, Asst. Atty. Gen., Jefferson City, George Peach, Circuit Atty., St. Louis, for respondent.

REINHARD, Judge.

Defendant was convicted by a jury of the offenses of robbery first degree and armed criminal action. The jury assessed his punishment at five years for the robbery charge and three years for the armed criminal action charge. The court entered judgment in accordance with the jury's verdict and assessment of punishment and ordered said sentences to run consecutively.

The victim was a cab driver. Defendant entered the victim's car at the Chase Park Plaza Hotel and shortly thereafter pulled a revolver on the victim and indicated

that "it was a stickup." The victim gave defendant a ten dollar bill, a five dollar bill, and some change. Defendant ordered the victim to drive to victim's home to get more money. While on the way, the victim saw some police cars waiting at a light at West Florissant and Calvary. The victim started blowing his horn, jumped out of the cab, and told the officers that the man in his car had held him up.

Officer Johnson testified that he placed defendant under arrest and recovered $20.15 in defendant's pocket, consisting of a ten dollar bill, a five dollar bill, and $5.15 in change. He further testified that he saw defendant get out of the car and throw a weapon under the automobile which was seized by Officer Jackson.

Officer Jackson testified that he seized a PPL 380 automatic weapon from under the cab. This weapon was recovered in evidence as Exhibit No. 1.

[1] Defendant's first two points refer to questions relating to defendant's possession of a gun at a time other than at the time of the offense charged. He first contends that the trial court erred in failing to grant a mistrial when prosecuting attorney "asked Defendant whether he had a gun at another location four days prior to the robbery for which he was on trial as said question goes beyond the scope of proper cross examination, was improper impeachment and was improper and highly prejudicial evidence of prior criminal behavior for which no conviction resulted. . . ."

On direct examination defendant denied that he had a gun with him on the date of the alleged offense. On cross-examination, defendant stated that he did not own a gun and that State's Exhibit No. 1 was not his gun. Further, he testified that he had never owned a gun that was similar to State's Exhibit No. 1. The prosecuting attorney then asked: "Isn't it a fact that you had a gun similar to that

gun [State's Exhibit No. 1] four days before that [May 5, 1978, the day of the robbery]? Before defendant could answer, defense attorney objected to the question and moved for a mistrial. The court sustained the objection, instructed the jury to disregard it, and denied the mistrial. The questioning then continued:

Q. Mr. White, is it your testimony you did not have this gun in your possession on May the 5th, 1978?

A. Yes.

Q. You did not?

A. No.

Q. Did you have a gun similar to this in your possession on May the 5th, 1978?

A. No.

Q. Did you have a gun, any gun similar to this in your possession prior to May the 5th, 1978,

A. No.

Q. Did you have a gun similar to that in your possession on May the 1st, 1978?

A. No.

Q. Did you have a gun similar to that in your—?

At this time defendant again objected. A discussion was conducted outside the hearing of the jury and thereafter the court overruled defendant's objection. The following questioning ensued:

Q. (By Mr. Hoag) It is your testimony on May the 1st, 1978, you did not have a gun in your possession similar to that? [State's Exhibit No. 1]

A. Yes.

Q. Is it your further testimony you did not have a

gun similar to that at 4903 Goodfellow, at approximately 10:30 p. m.?

A. Yes. . . .

Q. You did not have a gun in your possession at that time, 10:30 p. m., at 4903 Goodfellow?

A. I did not.

Q. 4903 Goodfellow, which is a Shell Service Station, you did not have a gun similar to that in your possession.

A. I did not.

[2, 3] Defendant's sole ground for objection was that the questions were evidence of other criminal activity. Defendant's other complaints which he has raised here on appeal were not stated at the time of the objection. On appeal, a defendant may not broaden the scope of his trial objections. *State* v. *Williams,* 575 S.W.2d 838, 840 (Mo. App. 1978). We therefore examine only defendant's contention that the questions asked as to his possession of a similar weapon at another time constituted evidence of other criminal activity. We recognize that proof of commission of a separate and distinct crime is not admissible unless such proof has a legitimate tendency to directly establish defendant's guilt or comes within one of several exceptions. *State* v. *Holbert,* 416 S.W.2d 129, 132 (Mo. 1967); *State* v. *Reese,* 364 Mo. 1221, 274 S.W.2d 304, 307 (banc 1954). It is not a crime to possess a gun and we cannot say that a question asking if the defendant was in possession of a gun four days prior to the offense for which he was charged constitutes evidence of another crime. This point is without merit.

[4] Defendant next contends that the court erred in permitting the state to produce the rebuttal testimony of Lamont Williams because it was improper impeachement

evidence and was evidence of another crime. Williams testified that he saw defendant with a gun at the Shell Service Station where he worked at 10:30 p.m. Defendant's attorney did not object to any specific questions asked of Williams. His only objection was that the testimony constituted evidence of another crime. Because we addressed this issue under the previous point, we need not discuss it here. We believe that the evidence was proper rebuttal. A police officer saw defendant throw a weapon under the car. State's Exhibit No. 1 was found under the car. Defendant denied the possession of a gun on the night of the crime May 5th. He denied any knowledge of State's Exhibit No. 1. Further, he denied having a similar weapon in his possession May 1. Witness Williams testified that he saw defendant on the night of May 1 at the Shell Service Station with a gun in his possession. He identified State's Exhibit No. 1 as the gun which defendant possessed. This was proper rebuttal. The jury could not reasonably have inferred from the state's rebuttal evidence that appellant had been involved in prior criminal activity. *See State* v. *Whitt*, 592 S.W.2d 316, 317 (Mo.App. 1979). Because this was proper rebuttal,[1] we find no error here.

[5] Defendant finally contends that the court erred in failing to grant a mistrial because the prosecuting attorney told the jury in the opening statement that defendant planned to take the victim to the victim's house and have sexual intercourse with his wife. Defendant claims that evidence relating to this statement was excluded at the trial and the state knew or should have known that it would be so excluded. The only portion of the opening statement in the record is the following:

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[1]. We note that at the time of his objection to the cross-examination of defendant, defense counsel said: "If Mr. Hoag has rebuttal evidence, he could bring in rebuttal as to gun ownership or someone who saw him with a gun."

> Mr. Hoag: The state's evidence will further show a conversation ensued, the defendant wasn't happy with the amount of money he had, and he asked Mr. Kranz if he had some money at home. The conversation ensued when Mr. Kranz said he did, and in addition a color T.V. was mentioned, and the defendant ordered him to drove to his house, which was in Spanish Lake, and he indicated at that time he was going to perform an act of sexual intercourse with his wife.

No objection was made at the time of the opening statement, but at the end of the defendant's case defendant asked for a mistrial because of the failure of the state to connect that portion of the state's opening statement relating to the proposed sexual intercourse with the victim's wife.

Initially, we note that defendant was charged with the offense of sodomy on the victim as well as those charges of which he was convicted. The jury acquitted him of the charge of sodomy. The state asked the victim: "Was there any conversation with respect to your wife; about your wife?" The defendant's attorney objected claiming the question was leading and the court sustained the objection. The state therefore did not produce any testimony as to the comment of the proposed sexual intercourse with victim's wife.

[6, 7] When the prosecuting attorney has reasonable grounds to believe that the facts stated in his opening statement can be proved, such statement is not improper, although the facts are not followed with proof because the evidence is either excluded or omitted. *State* v. *Underwood*, 530 S.W.2d 261, 263 (Mo.App. 1975). The trial court is vested with wide discretion in determining whether prosecuting attorney acted in good faith in making the statement. *Id.* Defendant admits that he was furnished the police report which included a statement by victim that

defendant made the complained of statement to him. We find no evidence of bad faith. If the victim had testified as to what the defendant had said, such evidence would have been admissible as part of the "res gestae." Regardless, defendant's failure to object at the first opportunity constituted a waiver. This point also is without merit.

[8] Subsequent to the filing of the briefs in this case the Supreme Court determined that convictions of robbery first degree with a dangerous and deadly weapon and armed criminal action violated the prohibition against double jeopardy. *Sours* v. *State,* 593 S.W.2d 208 (Mo. banc 1980). Therefore, we are compelled to reverse defendant's conviction of the offense of armed criminal action.

The conviction and judgment is reversed outright with respect to Count III, armed criminal action. The conviction and judgment in Count II, robbery first degree, is affirmed.

DOWD, P. J., and CRIST, J., concur.

STATE of Missouri, Respondent,

v.

Wallace D. COUNSELMAN, Jr., Appellant.
No. 41088.

Missouri Court of Appeals,
Eastern District,
Division Three.

March 25, 1980.

Motion for Rehearing and/or Transfer to Supreme Court Denied May 19, 1980.

Application to Transfer Denied Sept. 9, 1980.

Defendant was convicted following a bench trial before the Circuit Court, St. Louis County, Arthur Litz, J., of first-degree robbery and armed criminal action, and he appealed from judgment and sentence. The Court of Appeals, Clemens, Senior Judge, held that: (1) evidence was sufficient to show statutory element of putting the victim in fear, and (2) portion of judgment which convicted defendant of armed criminal action would be reversed on ground of double jeopardy.

Affirmed in part and reversed in part.

1. Robbery 24.1(3)

In prosecution for first-degree robbery and armed criminal action, evidence was sufficient to show statutory element of putting the victim in fear, notwithstanding fact that victim testified that he was not scared and felt no harm would come to him. V.A.M.S. §§ 569.010, 569.020.

2. Criminal Law 199

Portion of judgment which convicted defendant of armed criminal action would be reversed on ground of double jeopardy, where defendant had also been convicted of first-degree robbery. V.A.M.S. §§ 569.010, 569.020; U.S.C.A.Const. Amends. 5, 14.

C. Clifford Schwartz, Shaw, Howlett & Schwartz, Clayton, for appellant.

John Ashcroft, Atty. Gen., Paul Robert Otto, Lew A. Kollias, Asst. Attys. Gen., Jefferson City, George Westfall, Pros. Atty., Courtney Goodman, Asst. Pros. Atty., Clayton, for respondent.

CLEMENS, Senior Judge.

In this jury-waived case the trial court found defendant Wallace Counselman guilty of first degree robbery and

armed criminal action and sentenced him to imprisonment for concurrent eight and three year terms.

[1] Defendant first challenges the evidentiary sufficiency to show the statutory element of putting the victim in fear.[1]

We summarize the evidence. Defendant entered a restaurant, announced to the manager Wesley Bradley that his aim was robbery and pulled a loaded revolver from his pocket. When Bradley saw the weapon he "decided to go along". Defendant showed his gun to employees and on his order Bradley got money from a safe and cash registers, put it in a bank bag and ordered the employees into a walk-in cooler. Defendant held his gun to Bradley's head and guided him out the door. Meanwhile, a departing customer had told police a robbery was in progress; they were waiting for defendant at the door and ordered him to drop his gun. Defendant threatened to shoot Bradley, but finally yielded and threw down his gun.

Defendant testified the state's testimony was correct so far as he recalled, and gave a history of drug abuse extending to the time of the robbery.

Defendant cites portions of the victim's testimony that he was not scared and felt no harm would come to him. He relies on *State* v. *Tidwell*, 500 S.W.2d 329[6, 7] Mo.App. 1973), to support his contention there was no evidence showing the necessary element of the victim's fear. That case held that although the victim said he was not personally afraid when he gave his money to the defendant at gunpoint, "there could be no merit in the connection that the victim was not motivated by fear". Defendant also cites

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[1]Sections 569.010 and .020, L.1977, which became effective after this offense, omit the express element of "putting in fear"; now it suffices to show that in overcoming the victim's resistance defendant was armed with a deadly weapon.

State v. *Keeney,* 425 S.W.2d 85[1, 2] (Mo. 1968), which we find support the state, not defendant. The court there held that the victim's fear need not be expressly shown but may be presumed from evidence showing reasonable grounds therefor.

[2] We deny defendant's primary point and consider his double jeopardy contention, arising from dual convictions for robbery and armed criminal action. We originally denied that contention in accord with *State* v. *Valentine,* 584 S.W.2d 92[6] (Mo. banc 1979), and on January 8, 1980 we handed down our opinion affirming the judgment sentencing defendant to imprisonment for concurrent terms of eight years for first degree robbery and three years for armed criminal action. Then, on January 15, 1980 our supreme court reversed *Valentine* and held in *Sours* v. *State,* 593 S.W.2d 208, where, as here, movant had been convicted of first degree robbery and armed criminal action, and on the ground of double jeopardy the supreme court reversed that part of the *Sours* judgment convicting the movant of armed criminal action. So it is here.

Defendant has now moved for a rehearing. We order that denied but on our own motion we withdraw our original opinion. We now affirm the judgment convicting defendant of first degree robbery and sentencing him to eight years imprisonment therefor, but we reverse that part of the judgment convicting defendant of armed criminal action and sentencing him to a concurrent term of three years imprisonment for armed criminal action.

DOWD, P. J., and REINHARD and CRIST, JJ, concur.

STATE of Missouri, Plaintiff-Respondent,

v.

Bobby Joe McGEE, Defendant-Appellant.
No. 40082.

Missouri Court of Appeals,
Eastern District,
Division One.

April 1, 1980.

Motion for Rehearing and/or Transfer to Supreme Court Denied June 20, 1980.

Application to Transfer Denied Sept. 9, 1980.

Defendant was convicted in Circuit Court, City of St. Louis, Michael F. Godfrey, J., of assault with intent to do great bodily harm without malice and armed criminal action, and he appealed. The Court of Appeals, Snyder, J., held that: (1) where State was required to prove all of the elements of the underlying offense of assault with intent to do great bodily harm without malice, defendant's conviction for armed criminal action was obtained in violation of his double jeopardy rights, and (2) trial court committed reversible error in refusing to give the alibi instruction requested by defendant.

Conviction of armed criminal action reversed; conviction of assault with intent to do great bodily harm without malice reversed and remanded.

1. Criminal Law 1144.13(4)

In determining whether a submissible criminal case is made, an appellate court considers as true evidence and reasonable inferences most favorable to State and disregards evidence and inferences to the contrary.

2. Assault and Battery 95

Evidence, which consisted of a positive identification of defendant by the victim and recording of the license number of defendant's car by witness, was sufficient, when considered in light most favorable to State, to make submissible case against defendant on charges of assault with intent to do great bodily harm without malice and armed criminal action. V.A.M.S. §§ 559.190, 559.225 (Repealed).

3. Criminal Law 200(2)

Where State was required to prove all of the elements of the underlying offense of assault with intent to do great bodily harm without malice, defendant's conviction for armed criminal action was obtained in violation of his double jeopardy rights. U.S.C.A.Const. Amend. 5; V.A.M.S. §§ 559.190, 559.225 (Repealed).

4. Criminal Law 772(6), 1173.2(3)

In prosecution of defendant for assault with intent to do great bodily harm without malice, trial court committed reversible error in refusing to give the alibi instruction requested by defendant. MAI Criminal No. 3.22.

5. Criminal Law 772(6)

General alibi instruction must be given, if requested in manner provided by applicable rule, unless the affirmative-type instruction is requested by defendant; by requesting the affirmative-type instruction, a defendant submits to jury in a positive way that he was at a specific place other than scene of crime at time crime was committed and thereby accepts risk of burden of proof of his alibi when he requests such instruction. MAI Criminal Nos. 3.20, 3.22.

6. Criminal Law 772(6)

Choice of which alibi instruction to give is committed to

the defense and not to trial court. MAI Criminal Nos. 3.20, 3.22.

Karl F. Lang, Lang & O'Keefe, St. Louis, for defendant-appellant.

John Ashcroft, Atty. Gen., Peter T. Sadowski, Asst. Atty. Gen., Jefferson City, for plaintiff-respondent.

SNYDER, Judge.

Appellant Bobby Joe McGee was convicted of assault with intent to do great bodily harm without malice, § 559.190, RSMo 1969, and armed criminal action, § 559.225, RSMo Supp. 1976. He was sentenced to terms of five and three years' imprisonment to be served consecutively.

On appeal he alleges the trial court erred because it: (1) denied his motion for a judgment of acquittal for lack of a submissible case; 2) subjected him to double jeopardy in overruling his motion to dismiss the armed criminal action charge; (3) refused to give to the jury alibi instruction MAI-CR 3.22 requested by him; and (4) allowed into evidence testimony concerning blood stains and a knife found in his automobile, neither having been shown to be connected with the assault.

Reversed as to the armed criminal action conviction because appellant was subjected to double jeopardy; reversed and remanded as to the assault conviction because the trial court's refusal to give the alibi instruction requested by appellant was prejudicial error.

The victim was walking from a bar to her home in South St. Louis when she was assaulted by a man who forced her into the car he was driving by threatening her with a knife and cutting her hands. He then drove off with her. When the car slowed for an intersection the victim opened the door, started to get out, but was held in the

car by her assailant while the car moved along with her feet dragging on the ground. The driver finally stopped the automobile, the victim fell to the ground and her assailant stood over her threatening her with a knife if she did not get back in the car. He then stabbed the victim in the chest and side as she fought against being dragged back into the car.

Two men in another automobile had seen the victim hanging out of the car, folowed it until it stopped, then drove up and stopped about thirty feet behind it. As the two men started to approach the scene on foot, the assailant re-entered his car and drove off, leaving his victim lying on the ground. One of the witnesses obtained the license number.

A license check revealed appellant's father owned the vehicle. Appellant had been driving it at the time of the assault and was arrested for the crime. He was positively identified by the victim as her assailant. Appellant's defense was alibi. He claimed to have been at the River's Edge tavern in Fenton and there was evidence to support his claim. The trial and conviction followed.

Appellant argues the trial court erred in denying his motion for a judgment of acquittal because the state failed to make a submissible case.

[1] In determining whether a submissible criminal case has been made, an appellate court considers as true the evidence and reasonable inferences most favorable to the state and disregards evidence and inferences to the contrary. *State* v. *Franco*, 544 S.W.2d 533, 534[1-4] (Mo. banc 1976); *State* v. *Longmeyer*, 566 S.W.2d 496, 499[1-8] (Mo. App. 1978).

[2] The positive identification of appellant by the victim, and the recording of the license number of appellant's

car by a witness, constituted substantial evidence from which the jury could have found appellant guilty. It is true that conflicting descriptions of appellant and his automobile were testified to by witnesses. But the weight to be given this testimony was for the jury. *State* v. *Brager*, 497 S.W.2d 181, 182[2] (Mo. 1973); *State* v. *Tilley*, 569 S.W.2d 346[2, 3] (Mo.App. 1978). There was sufficient evidence when considered in the light most favorable to the state to make a submissible case. *State* v. *Franco*, *State* v. *Longmeyer*, *supra*.

[3] Appellant next claims he was placed in double jeopardy in violation of his common law and Fifth Amendment rights because he was convicted of both assault with intent to do great bodily harm without malice[1] and armed criminal action.[2] This point is well taken.

The conviction for armed criminal action required that the appellant first be found guilty of the offense of assault with intent to do great bodily harm without malice and, second, be found to have committed the crime with a knife. All of the elements of the underlying felony had to be proved in order to find appellant guilty of the offense of armed criminal action. Therefore, he was subjected to double jeopardy for the same offense. *Sours* v. *State*, 593 S.W.2d 208 (Mo. banc 1980). See also *State* v. *Morgan*, 592 S.W.2d 796 (Mo. banc 1980). In *Sours* the supreme court found that armed criminal action and the underlying felony, in that case robbery in the first degree, were the same offense for double jeopardy purposes, specifically overruling, on this point, *State* v. *Treadway*, 558 S.W.2d 646 (Mo. banc 1977), cert. denied 439 U.S. 838, 99 S.Ct. 124, 58 L.Ed.2d 135 (1978), which is relied upon by the state in its brief.

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[1].§ 559.190, RSMo 1969.

[2]§ 559.225, RSMo Supp. 1976.

The supreme court in *Sours* followed *Harris* v. *Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977) reversing *Harris* v. *State*, 555 P.2d 76 (Okl.Cr.App. 1976). The court interpreted *Harris* as requiring a finding that armed criminal action under the statute and the underlying felony, even though it violated a different statute, constitute only one offense and not two.

In *Sours* the state was required to prove all of the elements of robbery first degree in order to prove the defendant guilty of armed criminal action. Similarly, in the case under review, it was necessary to prove all of the elements of intent to do great bodily harm in order to prove armed criminal action. Therefore, the conviction for armed criminal action must be reversed.

[4] Appellant next contends the trial court erred in refusing to give to the jury alibi Instruction No. "A" requested by him in the form set out as MAI-CR 3.22:

INSTRUCTION NO. "A"

(In pertinent part. The first two paragraphs are the same as those in MAI-CR 3.20 given by the court and quoted below.)

> "2. If the defendant was at the River's Edge Lounge, 4 Gravois Road, Fenton, Missouri, 63026, at the time the alleged offense was committed or if you do not find and believe from the evidence beyond a reasonable doubt that the defendant was present at the time and place the offense is alleged to have been committed, then you must find the defendant not guilty."

Instead, the court gave MAI-CR 3.20:

"INSTRUCTION NO. 11

> One of the issues in this case is whether the defendant was present at the time and place the offenses

are alleged to have been committed. On that issue you are instructed as follows:

1. The state has the burden of proving beyond a reasonable doubt that the defendant was present at the time and place the offenses are alleged to have been committed.

2. If the evidence in this case leaves in your mind a reasonable doubt regarding the defendant's presence at the time and place the offenses are alleged to have been committed, then you must find the defendant not guilty."

The trial court erred in refusing to give the alibi instruction requested by appellant, the error was prejudicial, and the cause must be reversed and remanded for a new trial on the assault charge.

[5] MAI-CR 3.20 must be given, if requested in the manner provided in Rule 28.02, formerly 20.02, unless MAI-CR 3.22 is requested by a defendant.[3] By requesting MAI-CR 3.22 a defendant submits to the jury in a positive way that he was at a specific place other than the scene of the crime at the time the crime was committed. Notes on Use 2, Instruction MAI-CR 3.22.[4] A defendant accepts the risk

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[3]Notes on Use 1, Instruction MAI CR 3.20.

[4]Notes on Use, Instruction MAI CR 3.22:

1. See *Notes on Use* under MAI CR 3.20.

2. The difference between this instruction and MAI CR 3.20 is the first part of paragraph 2. This instruction would be reversible error if given without a specific request for it from the defendant, since the first half of paragraph 2 may be construed as placing the burden of proving the defense on the defendant. *State* v. *Taylor*, 118 Mo. 153, 24 S.W. 449 (1893).

But a defendant may wish to ignore the burden of proof implicit in an affirmative type of submission. He may wish to request this instruction so as to submit in a positive way that he was, say, in Kansas City and not in St. Louis where the crime was committed--rather than having the jury be told in a negative manner that it cannot convict unless it finds that he was in St. Louis. Compare, for example, the alternative forms of converses in MAI CIVIL."

of the burden of proof of his alibi when he requests this affirmative type submission. This the appellant attempted to do here.

The affirmative submission was supported by the evidence. The victim's testimony was that the attack occurred sometime before 10:20 p.m. and ended at approximately that time. The police report showed the attack occurring at 10:30 p.m. Witness Bohnert's testimony placed appellant at the River's Edge Lounge in Fenton at 10:45 p.m. and the appellant said that he left River's Edge at 10:50 p.m. to drive to the Hee Haw Club in South St. Louis.

The purpose of having the two alibi instructions is to allow a defendant to choose to submit the one designating a specific place, and to take the risk of proving that he was at the designated alibi place when the crime was committed, not at the scene of the crime. Appellant had the right to request MAI-CR 3.22 under the evidence.

[6] The choice of which instruction to give is committed to the defense and not the trial court. It was appellant's prerogative to submit the case to the jury so as to focus its attention on the testimony placing appellant at the Fenton tavern at the time of the assault. The refusal of the MAI-CR 3.22 instruction prevented the appellant from directing the jury's attention to the evidence he felt bolstered his case the most. Under the pattern instructions he is permitted to take the risk of the burden of proof. The refusal was therefore error.

To find the error harmless would render the Notes on Use of the two instructions meaningless by permitting the trial court, rather than the appellant, to decide which instruction to give, even though there is evidence to support the giving of MAI-CR 3.22. No cases have been cited by either party and none have been found which rule on this specific point. It is difficult to conceive of a case, however,

in which MAI-CR 3.20, the general alibi instruction, would not adequately instruct the jury even when there is substantial evidence of the defendant's presence at a specific place other than the scene of the crime. Therefore, to give meaning to the two alibi instructions and the Notes on Use as promulgated by the supreme court it is necessary to find that the trial court's refusal to give Instruction MAI-CR 3.22 was prejudicially erroneous.

The state argues that the appellant could have been en route from Fenton to the Hee Haw Club at the time of the attack instead of at River's Edge. If so, the state concludes, Instruction No. A placing appellant definitely at River's Edge at the time of the crime would have been erroneous. The evidence as to times was conflicting but the earliest time of arrival at the Hee Haw Club in the testimony was 10:50 p.m. According to the victim the assault began at approximately 10:10 p.m. and ended at approximately 10:20 p.m., although the police report, hearsay evidence, placed the time at 10:30 p.m. Appellant testified the time required to drive from River's Edge to the Hee Haw Club was twenty to twenty-five minutes. To arrive at the Hee Haw Club at 10:50 p.m., therefore, he could have left River's Edge no earlier than 10:25 p.m., after the assault had already occurred or was in progress. There was no substantial evidence that appellant was en route from River's Edge at the time of the crime.

The state relies on *State* v. *Reynolds*, 517 S.W.2d 182 (Mo.App. 1974) to support its contention that the refusal to give appellant's Instruction No. "A" was not prejudicial error. *Reynolds* was submitted prior to the effective date of the MAI-CR instructions, and although the logic of *Reynolds* might be found applicable here, the Supreme Court Rules and Notes on Use of the MAI-CR Instructions must be followed.

Finally, appellant claims that the trial court erred in admitting into evidence testimony concerning bloodstains found in his father's car and a knife which was found in the trunk of the automobile. This point has not been preserved for appellate review because no proper objection was made when the evidence was introduced and will not be addressed on this appeal. The problem may not arise in the same manner upon retrial.

The judgment of conviction of armed criminal action is reversed; the judgment of conviction of assault with intent to do great bodily harm without malice is reversed and remanded for a new trial.

KELLY, P. J., and STEWART, J., concur.

STATE of Missouri, Plaintiff-Respondent,

v.

Harold **HAWKINS**, Defendant-Appellant.
No. WD 31334.

Missouri Court of Appeals,
Western District.

Nov. 3, 1980.

Motion for Rehearing and/or Transfer to Supreme Court Denied Dec. 2, 1980.

Application to Transfer Denied
Jan. 13, 1981.

Defendant was convicted in the Circuit Court, Jackson County, James A. Moore, J., of armed robbery and armed criminal action, and he appealed. The Court of Appeals, Dixon, J., held that: (1) conviction for armed criminal action would be reversed; (2) defendant could not assert

prejudice arising out of out-of-court identification, since that evidence was elicited by defendant's attorney on cross-examination; and (3) in-court identification by robbery victim was admissible.

Affirmed in part and reversed in part.

1. Criminal Law 1137(5)

Defendant could not assert prejudice arising out of out-of-court identification, since that evidence was elicited by defendant's attorney on cross-examination.

2. Criminal Law 1137(5)

Defendant may not assert prejudice arising from testimony produced by defendant's own counsel.

3. Criminal Law 339.10(6)

Even if out-of-court identifications were suggestive, in-court identification is admissible if it is inherently reliable and had origin and basis independent of other identifications.

4. Criminal Law 339.10(7)

In-court identification of defendant by robbery victim was properly admitted, as having inherent reliability and an independent basis, where victim viewed defendant in a lighted room, had "a real good look" for "two minutes," his description was very precise, and in-court identification was unequivocal.

Clifford A. Cohen, Public Defender, Gary L. Gardner, Asst. Public Defender, Kansas City, for defendant-appellant.

John Ashcroft, Atty. Gen., Jefferson City, Philip M. Koppe, Asst. Atty. Gen., Kansas City, for plaintiff-respondent.

Before CLARK, P. J., and DIXON and SOMERVILLE, JJ.

DIXON, Judge.

Defendant appeals concurrent convictions for armed robbery and armed criminal action. The conviction for armed criminal action must be reversed. *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc 1980). The issue remaining is the propriety of the evidence of identifications made by the victim in the armed robbery case.

The facts are relatively simple. The victim was accosted outside his residence and, with a gun at his back, was relieved of his money. Upon demand, he indicated there was more money in the study of his home. Forced into the lighted study with the gun in his back, the victim feigned a fainting spell and observed the assailant for "a real good look" for "about two minutes." The assailant was interrupted in his rummaging through the drawer of a desk by the arrival of the victim's landlord who lived upstairs. The assailant shot the victim and at the landlord, then fled. The victim gave the police a detailed description of the assailant.

Some thirty minutes later, a police officer came to the scene to show a lab technician a "mug shot" of a person police suspected of a rash of robberies in the area. The purpose was to have the technician check any fingerprints found at the scene with the fingerprints of the person in the "mug shot." These fingerprints would be in the file with the number of the "mug shot." The victim inadvertently glimpsed the photo and made a tentative identification. On the basis of the physical description given by the victim, a policeman had attempted to apprehend the defendant some eleven blocks from the scene. The victim later identified the defendant in a lineup.

[1, 2] The defendant contends that the out-of-court identifications were improperly placed in evidence. The State counters first with a persuasive argument that the out-of-court identifications were admissible. It is not necessary to reach or decide that issue, however, as the State did not offer any evidence that the victim had made any out-of-court identifications. That evidence was elicited by defendant's attorney on cross examination. A defendant may not assert prejudice arising from testimony produced by defendant's own counsel. *State* v. *Cooksey*, 499 S.W.2d 485, 488 (Mo. 1973); *State* v. *Stenner*, 591 S.W.2d 123, 125 (Mo.App. 1979).

[3] The defendant also contends the in-court identification of the victim was improperly admitted. Even if it be assumed that the earlier out-of-court identifications were suggestive—a fact which the State strenuously and persuasively contests—the in-court identification is admissible if it is inherently reliable and had an origin and basis independent of the other identifications. *State* v. *Bivens*, 558 S.W.2d 296 (Mo.App. 1977); *State* v. *Jones*, 558 S.W.2d 810 (Mo.App. 1977).

[4] Viewing the entire evidence, there was an inherent reliability in the identification and an independent basis for it. The victim viewed the defendant in a lighted room; he had "a real good look" for "two minutes." His description from that view was a very precise description of the defendant, causing the police to attempt to apprehend the defendant near the scene of the crime. His view of the defendant was not casual or passing; it was intentional. The in-court identification was unequivocal, and the relatively short periods between the crime and the out-of-court identifications do not imply the later positive in-court identification was not inherently reliable. Under the standards by which the admissibility of in-court identifications are measured and in the totality of the circumstances, the in-

court identification was properly in evidence. *State* v. *Higgins*, 592 S.W.2d 151, 160 (Mo. banc 1979), *appeal dismissed Higgins* v. *Missouri*, 446 U.S. 902, 100 S.Ct. 1825, 64 L.Ed.2d 254 (1980); *State* v. *Carter*, 572 S.W.2d 430, 435 (Mo. banc 1978).

The conviction for armed robbery is affirmed; the conviction for armed criminal action is reversed.

All concur.

STATE of Missouri, Respondent

v.

Eddie GREER, Appellant.
No. WD 31117.

Missouri Court of Appeals,
Western District.

Nov. 3, 1980.

Motion for Rehearing and/or Transfer to
Supreme Court Denied Dec. 2, 1980.

Application to Transfer Denied
Jan. 13, 1981.

Defendant was convicted in the Circuit Court, Division No. 18, Jackson County, Louis Lombardo, J., of two counts of kidnapping, two counts of rape, two counts of sodomy and two counts of armed criminal action, and he appealed. The Court of Appeals, Manford, J., held that: (1) defendant was placed in double jeopardy by being charged with both armed criminal action and kidnapping by and through the use, aid and assistance of a dangerous and deadly weapon; (2) trial court's order granting State's motion to have defendant fingerprinted, which declared only that the State had presented "good cause" in support of the motion, was

not tantamount to noncompliance with rule requiring the court to state reasons for its decision, where the order followed argument by both parties wherein reasons had been presented; (3) absent showing that use of hypnosis was impermissibly suggestive and that "a very substantial likelihood of irreparable misidentification" occurred, evidence based thereon was not inadmissible as a matter of law, but rather such hypnotic process went to the weight of the testimony of the evidence and was matter for determination by the trier of fact; and (4) witnesses' identifications of defendant were reliable for purposes of admissibility.

Judgment reversed in part and affirmed in part.

1. Criminal Law 200(1)

Double jeopardy prohibits punishment for armed criminal action in connection with any "underlying felony" upon which the armed criminal action is based. U.S.C.A. Const. Amends. 5, 14; V.A.M.S. § 559.225 (Repealed).

2. Criminal Law 200(1)

Defendant was placed in double jeopardy by being charged with armed criminal action and kidnapping by and through the use, aid and assistance of a dangerous and deadly weapon. U.S.C.A.Const. Amends. 5, 14; V.A.M.S. §§ 559.225, 559.240 (Repealed).

3. Criminal Law 1166.11

Defendant could not complain of order requiring him to be fingerprinted on the ground that no evidentiary hearing on necessity was held, where as a result of such order defendant was afforded greater protection of his right to a fair trial and where, if state had offered evidence upon the reasons for the fingerprints, the motion to require fingerprinting would have been granted, and, if state had been unable to produce evidence upon the motion, the prints

already in the state's possession would have been produced. V.A.M.R. Crim. Rules 25.35, 25.35(C, D)(Repealed).

4. Criminal Law 633(1)

Order granting State's motion to have defendant fingerprinted, which declared only that State had presented "good cause" in support of the motion, was not tantamount to noncompliance with rule requiring the court to state reasons for its decision, where the order followed argument by both parties wherein reasons had been presented. V.A.M.R. Crim. Rules 25.35, 25.35(C, D) (Repealed).

5. Criminal Law 1035(3)

Where no objection was made at trial to lack of reasons in trial court's order requiring defendant to be fingerprinted and no mention or challenge of the order as violative of rule requiring reasons was made in defendant's motion for new trial, nothing on the point was preserved for review. V.A.M.R. Crim. Rule 25.35 (Repealed); V.A.M.R., Crim. Rule 29.11(d).

6. Criminal Law 339.7(4)

Photographic array, which included 13 photos of which defendant appeared in four, was not impermissibly suggestive so as to require exclusion of witnesses' identifications of defendant.

7. Criminal Law 339.8(4)

Lineup from which witnesses separately and independently identified defendant was not impermissibly suggestive so as to require an exclusion of their identifications, even though defendant was the shortest person in the lineup and the persons in the lineup were so aligned as to form a "V" shape with the base of the "V" pointing to defendant.

8. Criminal Law 385

Absent showing that use of hypnosis was impermissibly suggestive so that "a very substantial likelihood of irreparable misidentification" occurred, evidence based thereon was not inadmissible as matter of law, but, rather, such hypnotic process went to the weight of the testimony of the evidence and was a matter for determination by the trier of fact.

9. Criminal Law 339.9(2)

Reliability of identification is to be reviewed from the "totality of the circumstances" and the factors to be considered in the "totality of circumstances" include the "opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and confrontation."

10. Criminal Law 339.9(1)

Witnesses' identification of defendant were reliable for purposes of admissibility, where witnesses had ample opportunity to view defendant, they provided police officers with a description within a short time following the assault upon them, such description varied little and without marked difference from subsequent identification by both witnesses, one witness continuously and without reservation identified defendant and the other made an unequivocal positive identification of defendant after she heard his voice in the courtroom, observance of photographic array occurred three weeks after the assault, and lineup observation occurred some 37 days after the assault.

Clifford A. Cohen, Public Defender, Gary L. Gardner, Asst. Public Defender, Kansas City for appellant.

John Ashcroft, Atty. Gen., Jefferson City, Earl W. Brown, III, Philip M. Koppe, Asst. Attys. Gen., Kansas City, for respondent.

Before TURNAGE, P. J., and SHANGLER and MANFORD, JJ.

MANFORD, Judge.

This is a direct appeal from convictions for two counts of kidnapping, two counts of rape, two counts of sodomy and two counts of armed criminal action. The jury assessed punishment of six hundred twenty years imprisonment. The judgment is reversed in part and affirmed in part.

Appellant presents three points of error, which in summary allege (1) the trial court erred in failing to dismiss the two counts of armed criminal action because said counts placed appellant in double jeopardy; (2) the trial court erred in compelling appellant to be fingerprinted because, although requested, appellant received no evidentiary hearing pursuant to Rule 25.35; and (3) the trial court erred in admitting both the out-of-court and in-court identification of appellant because the identification was the result of impermissible suggestion by hypnosis, and apart from any suggestiveness, identification premised upon hypnosis is inherently unreliable and violates appellant's rights to constitutional due process.

On November 1, 1977, at about 7:30 p.m., two teenage girls drove to a local record shop in Kansas City, Missouri. They were in the record shop for about 15 minutes and departed early because while inside, they noticed a black male staring at them. The girls rushed to their stationwagon, which was parked and locked on a side street. As the one girl (driver) was unlocking the stationwagon and opening the right front door for the other girl, a white automobile with four or five black males inside backed up alongside the stationwagon. A voice from inside the white automo-

bile asked the girls, "How are you doing tonight?" The girls did not respond. As the girls got into the stationwagon, appellant, with a gun, forced his way into the stationwagon on the passenger side. Appellant pointed the gun at the girls and made them drive through an alley where another black male was located. This second man knocked on the window of the stationwagon and entered the stationwagon. At this point, the girls were forced to move to the rear seat with appellant. Appellant ordered the girls at gunpoint to lay their heads on his lap. The other black male drove the stationwagon. While they were riding and in this position, appellant ordered one of the girls to unzip her pants and appellant placed his hand inside her pants.

After a ride lasting approximately 10-15 minutes, the girls were taken inside a house. Appellant and the other black male were joined in the house by three or four more black males. At gunpoint, the girls were ordered to disrobe. They were told if they did not disrobe, they would be shot or killed. After they removed their clothing, the girls were subjected to multiple and simultaneous acts of vaginal, oral and anal sexual assault by appellant and the other four or five black males in the house. The girls were then ordered to dress, and after doing so, were told to undress, and repeated sexual assaults again occurred. After the second assaults, the girls were taken back to their stationwagon by appellant and another black male. They were ordered to lay on the back seat and from that position, neither girl could observe their location. The time at this point was approximately 11:00 p.m. as the radio was on in the stationwagon and the hour was announced. After driving a short period of time, appellant and the other black male abandoned the girls in the stationwagon. The girls lay on the back seat for about 45 minutes, as appellant had told them to do, because he was going to talk to someone and would return in about 20 minutes. When the girls realized the two black

males were gone, they jumped in the front seat and drove the stationwagon away. While driving away, the girls became involved in a collision with another vehicle. They asked the driver of the other vehicle to take them to the hospital. This other driver took the girls to Menorah Hospital. At the hospital, the girls met with a policeman, who transported them to St. Luke's Hospital. At approximately 1:00 a.m., a medical examination was performed on both girls. The medical examination revealed seminal fluid with live sperm in both of the girls and the fact that sexual intercourse had occurred.

While at St. Luke's Hospital, the girls described their abductor as a negro male about 30 years of age, five foot six, 150 pounds, of stocky build with a mustache and afro hairdo of medium length. They said he was wearing a black hat and white coat and was armed with a silver-colored handgun.

An investigation was launched, which resulted in an indictment charging appellant with kidnapping, rape, sodomy and armed criminal action. Numerous pretrial motions were filed and hearings held thereon. Appellant presented an alibi defense. The jury entered its verdict and following the overruling of appellant's motion for new trial, this appeal followed.

Turning to appellant's point one, this court is required to determine whether or not appellant was placed in double jeopardy by being charged with kidnapping (two counts because there were two victims) by and through the use, aid and assistance of a dangerous and deadly weapon; and by the use, aid and assistance thereof, he was charged with two counts of armed criminal action.

Appellant was charged with kidnapping in violation of § 559.240, RSMo 1969, the pertinent part of which reads:

"*559.240. Kidnapping.*—1. If any person shall, willfully and without lawful authority, forcibly seize, confine, inveigle, decoy or kidnap any person, with intent to cause such person to be sent or taken out of this state, or to be secretly confined within the same against his will, or shall forcibly carry or send such person out of this state against his will, he shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding ten years."

Because appellant kidnapped the two girls at gunpoint, he was charged with two counts of armed criminal action in conjunction therewith. These two counts were premised upon violation of § 559.225 RSMo Supp. 1976, which reads:

"*559.225. Armed criminal action—penalty—exceptions.*—1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than five years. The punishment imposed pursuant to this subsection shall be in addition to any punish-

ment provided by law for the crime committee [sic] by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of five calendar years.

3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than ten years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of ten calendar years.

4. The provisions of this section shall not apply to the felonies defined in sections 559.005, 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo."

The issue of double jeopardy arises, of course, from and as a result of the decision by our State Supreme Court in *Sours* v. *State,* 593 S.W.2d 208 (Mo. banc 1980). It is not necessary to reiterate the details of *Sours,* but it suffices to state that the conviction of sours for robbery, first degree and armed criminal action was held to have subjected Sours to conviction and punishment twice for the same offense, thereby placing Sours in double jeopardy and violating his constitutional rights.

Following the vacating of *Sours* by the United States Supreme Court in light of *Whalen* v. *United States,* 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), and a remand to our State Supreme Court (see *Missouri* v. *Sours,* 593 S.W.2d 208 (1980), a second opinion was issued by our

State Supreme Court which resulted in the reinstatement and supplement of its original opinion, see *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc 1980).

Reduced to its simplest form, the entirety of this issue rests upon the answer to the following questions: Does *Sours* prohibit punishment for armed criminal action and an "underlying felony" when such felony is robbery in the first degree *only*? or Does *Sours* mandate a broader application which results in the prohibition of punishment for armed criminal action in conjunction with any "underlying felony" upon which the armed criminal action is based?

Our State Supreme Court, in the original *Sours* decision, concluded that robbery, first degree and armed criminal action are the same offense regarding double jeopardy and that punishment for both, whether occurring in a single proceeding or successive proceedings is prohibited. Our State Supreme Court took from and applied the "same offense test" expressed in *Blockburger* v. *United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The court, in *Blockburger*, declared at 304, 52 S.Ct. at 182:

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."

In *Sours*, our State Supreme Court concluded that § 559.225 does more than enhance the punishment for the underlying felony. Rather, the court concluded that the statute required two sentences for two crimes (i. e., robbery, first degree and armed criminal action). Our State Supreme Court concluded that armed criminal action and

the underlying felony constituted only one offense and not two, and in applying the "same offense test" from *Blockburger*, further and finally concluded that "conviction for both robbery first degree and armed criminal action places a defendant twice in jeopardy by multiplying the punishment for one offense," *Sours*, 593 S.W.2d at 222.

The United States Supreme Court then handed down its decision in *Whalen* v. *United States, supra*. *Whalen* reversed a conviction for rape and felony murder (the murder having been committed in perpetration of the rape). The United States Supreme Court concluded the rape and the felony murder were the "same offense", applying *Blockburger*, and declaring, "proof of rape is a necessary element of proof of the felony murder". *Whalen* 100 S.Ct. at 1439. The United States Supreme Court then vacated *Sours* in light of the *Whalen* decision and *Sours* was remanded for reconsideration by our State Supreme Court.

Upon remand, our State Supreme Court interpreted *Whalen* in a very narrow context. In the second *Sours* decision, our State Supreme Court held that *Whalen* failed to answer the question of whether legislative intent regarding imposition of multiple punishments for the same offense violated the prohibition against double jeopardy. Our State Supreme Court construed *Whalen* as having only reached the question of whether or not, by statute, the legislature intended multiple punishment for the same offense. Our Supreme Court found that the United States Supreme Court concluded in *Whalen* that the legislature did not intend multiple punishments for the same offense, but that *Whalen* did not address or provide any direction relative to the constitutional question of double jeopardy. From this conclusion, our State Supreme Court felt obligated to again look at § 559.225 with regard to the legislative intent therein and without any direction or guidance from *Whalen*.

In its second consideration of *Sours*, our State Supreme Court applied the "same offense test" in *Blockburger* and concluded that the language of the armed criminal action statute, § 559.225, and the statute defining the underlying felony (robbery first degree) "plainly" do not "require proof of a fact which the other does not . . ." *Sours* v. *State*, 603 S.W.2d 592, 598 (Mo. banc 1980).

Whalen declared that the court should presume that cumulative punishments were not intended by the legislature where the same offense is involved, unless a contrary intent exists. In *Sours*, our State Supreme Court found that the Missouri legislature did intend to authorize conviction and punishment for both armed criminal action and the underlying felony. Having reached that point, our State Supreme Court proceeded to decide the proposed constitutional issue of double jeopardy. This conclusion departs from *Whalen*, for in *Whalen*, the court had not found such legislative intent.

In its second *Sours* decision, our State Supreme Court adopted its analysis from its first *Sours* decision and held thusly, at p. 603 of its opinion:

> "The double jeopardy clause of the fifth amendment to the United States Constitution prohibits the state from punishing a person twice for the same offense . . . (citations omitted) . . . Armed criminal action and the underlying felony used to prove armed criminal action—in this case, robbery first degree—are the same offense for double jeopardy purposes under the same evidence test, because it is not the case that proof of robbery requires proof of any fact not also required to prove armed criminal action . . . (citations omitted) . . . Therefore, the double jeopardy clause prohibits separately punishing a person both for armed criminal action and for the underlying felony."

The result in the second *Sours* decision was the vacating of appellant's conviction for armed criminal action and the reinstatement of the original *Sours* decision as supplemented.

The instant proceedings require this court to interpret *Sours* and to determine the extent of its applicability regarding felonies other than the felony of robbery, first degree, hence the question above as to whether or not, for purposes of double jeopardy, punishment for armed criminal action is restricted to robbery, first degree. The instant proceedings also require this court to determine whether or not *Sours* mandates a broader application, resulting in the prohibition of punishment for armed criminal action in conjunction with any "underlying felony" upon which the armed criminal action is based.

[1, 2] This court is bound to follow the mandate of our State Supreme Court. This court concludes that the prohibition mandated in *Sours* applies to all underlying felonies and is not limited or restricted to the felony of robbery, first degree. This conclusion is reached for the following reasons and upon the following analyses.

In the first instance, our State Supreme Court, in both *Sours'* opinions, speaks in general terms about armed criminal action and the "underlying felony". Both opinions only occasionally specify the particular felony involved, to wit, robbery in the first degree. In substance, both opinions, in speaking of the "underling felony" do not limit the effect of the opinions to robbery, first degree. For example, in the first *Sours* opinion, the court declared:

> "We find that armed criminal action and the underlying felony, in this case robbery first degree are the 'same offense' for double jeopardy purposes." *Sours,* 593 S.W.2d at 210.

In its second decision, at pp. 597, 598, 599 and 604 of the opinion, the State Supreme Court stated:

> "Applying *Blockburger* as a rule of statutory construction to the armed criminal action statute and the statute defining *the underlying offense, in this case robbery first degree statute* . . . § 559.225 . . . plainly authorizes punishment both for armed criminal action and *for the underlying felony* . . . Therefore, the double jeopardy clause prohibits separately punishing a person both for armed criminal action and *for the underlying felony.*" (emphasis added)

In addition, if the "same offense test" in *Blockburger* were applied as it was in *Sours*, the result reached would be the same, whether applied in those cases where the underlying felony is robbery, first degree, or as in the instant case, the underlying felony is kidnapping, or to any case involving any specific underlying felony and armed criminal action arising out of that felony. Further, *Sours* has held that the offense of armed criminal action, by definition, includes the underlying felony, in turn defining the underlying felony as a lesser and included offense. Still further *Sours* mandates, for the purposes of double jeopardy, that a greater offense is the "same" offense. This was expressed in *Sours* as follows:

> "The crime of armed criminal action consists of two features: (1) any felony, and (2) the use of a dangerous and deadly weapon in the commission of (1). The first feature may be any one of a class of offenses, each of which consists in turn of several elements. If (1) specified a single felony, it would be obvious that armed criminal action includes all of the elements of the felony specified . . . the result is no different where the statute refers to 'any felony'. Proof of armed criminal action still 'cannot be had

without' proof of the underlying offense. *Harris* stands for the proposition that when a statute defines a crime as 'any felony' plus other elements, proof of the particular felony involved is required to prove that crime . . . Thus . . . armed criminal action and the underlying felony constitutes only one offense and not two." *Sours*, 593 S.W.2d at 219-220

In its *Sours* decision, our State Supreme Court mandated that § 559.225 be construed as if the sentence, "The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with or through the use, assistance or aid of a dangerous or deadly weapon," were in fact stricken from each subsection of § 559.225.

In applying the foregoing analysis of *Sours*, this court concludes that the prohibition premised upon double jeopardy is not limited or restricted to the felony of robbery, first degree, but applies to any underlying felony. For and upon the foregoing reasons, point one raised by appellant is sustained and the convictions are reversed. The sentences affixed pursuant thereto are held to be void.

In point two raised by appellant, the record reveals that during the pretrial hearings on appellant's motions to suppress, respondent filed a motion to compel the taking of appellant's finger and palm prints pursuant to Rule 25.35.[1] Prior to the filing of the written formal motion, respondent, in the presence of appellant's counsel, informed the court that the motion was being filed to avoid transporting a former police officer who, at the time of trial, was a resident of California. This police officer had previously taken appellant's fingerprints while an officer in the State of Illinois. At this juncture, appellant's counsel

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[1]Now Rule 25.06(c).

responded, "I will . . . I would anticipate the hearing on that motion would be less than 10 minutes."

The written motion was filed when the court reconvened. Respondent explained to the court the great expense involved in bringing the former police officer from California. Respondent also explained that since appellant was fingerprinted in Illinois as a result of another criminal charge, the production of the prints obtained in Illinois might suggest to the jury appellant's involvement in other criminal activities.

Appellant opposed the motion, stating it was his understanding that Rule 25.35 required a hearing with production of evidence. Appellant further claimed the state was required to show why prints were necessary and what difficulties would be encountered by offering the prints, as they were possessed by respondent. Respondent had the master card of the prints taken in Illinois. Appellant further argued that prints need not be taken because respondent had the master card, that the situation should have been apparent to respondent prior to the day before trial and that the prints could be introduced by use of the master card in such manner as to devoid reference to appellant's involvement in other criminal activity.

After listening to counsel for respondent and appellant, the trial court entered the following order:

"Now on the 4th day of June, 1979, plaintiff presenting to this court good cause, the Court orders that the inked impressions requested in the State's Motion to Compel the Taking of Defendant's Fingerprints and Palmprints, be taken from Defendant Eddie L. Greer in a manner agreed on by the State and Defendant."

Appellant claims that Rule 23.35 (now 25.06), particularly subsections (C) and (D) were not complied with. The pertient portions of this rule are:

"(B) Upon motion by the state, and subject to constitutional limitations and any other safeguards deemed appropriate by the court, and upon a showing of good cause, the court may order the defendant to: . . . (3) Be fingerprinted . . .

(C) If requested by any party, the court shall hear evidence on the necessity of discovery requested under Rule 25.06(B).

(D) In its order directing discovery under this Rule, the court shall make the grounds for its decision on a part of the record."

Rule 25.35, predecessor to Rule 25.06, became effective on July 1, 1974 and since its inception, no case has construed the rule.

When appellant was advised the motion was going to be filed, appellant did not anticipate any lengthy consideration of motion. The record, when viewed in total, reveals that appellant had no real objection to it and in fact argued the master card from Illinois could be introduced in such a manner as to avoid alerting the jury that he was involved in other criminal activity.

[3] Respondent pointed out to the trial court that one of the main reasons for requesting appellant's fingerprints, and hence discarding the use of the Illinois master card, was to safeguard appellant. Appellant cannot be heard to complain upon alleged noncompliance of the rule on that basis because, as a result of the request and the subsequent order by the trial court, he was offered greater protection of his rights to a fair trial. Further, if the state were to have offered evidence upon the reasons for the fingerprints, the motion would have been granted. Conversely, if the state were unable to produce evidence upon the motion, the prints via the Illinois master card would have been pro-

duced. The result of the trial court's action was to protect appellant from potential prejudice which might have arisen if the Illinois master card had been produced, indicating other criminal behavior. The bare assertion of no evidentiary hearing, contrasted with the facts and circumstances of the instant case, shows this argument to be without merit.

[4, 5] Appellant also argues that the court did not state grounds for the decision as required by the rule (see Rule 25.35[D] above). That portion of appellant's argument fails for two reasons. The order declares that respondent presented to the trial court "good cause" in support of the motion. It must be pointed out that the order followed argument by both parties wherein the reasons (i. e., transport of a former police officer and the possible prejudice to appellant by use of the Illinois master card) had been presented. These factors and review of the entire record upon this point do not lead to the conclusion that the trial court's failure to further specify the reasons for its order is tantamount to noncompliance with the rule. In addition, no objection to the trial court's order was raised at trial and such issue is first raised upon this appeal. No mention or challenge of the order as violative of Rule 25 35(D) was made in appellant's motion for new trial. Nothing on this point was preserved for review, see Rule 29.11(d) (formerly rule 27.20); *State* v. *Martin*, 451 S.W.2d 96 (Mo. 1970) and *State* v. *Holmes*, 439 S.W.2d 518 (Mo. 1969).

For the foregoing reasons, point two is ruled against appellant.

Disposition of appellant's final alleged error necesitates interrelated consideration of appellant's pretrial motion to suppress evidence and the evidence developed upon trial. Appellant argues that identification of appellant was not admissible because such identification was the result of impermissibly suggestive hypnosis and, even if

there were no impermissive suggestions, the process of identification resulting from hypnosis was inherently unreliable.

Our courts have spoken to the issue of impermissible suggestive identification. The latest authority presenting the analysis to be applied is *State* v. *Higgins*, 592 S.W.2d 151 (Mo. banc 1979). *Higgins* involved pretrial identification by use and the viewing of photographs. Our State Supreme Court held at 592 S.W.2d at 159 the danger to be guarded against is any procedure "so impermissibly suggestive as to give rise to a very substantial likelihood of *irreparable misidentification*". (emphasis added)

In determining whether such a danger exists, our courts must look to the totality of the surrounding circumstances, see *Simmons* v. *United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1967) and *Stovall* v. *Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1966). In weighing the matter, two questions arise and were present In the *Higgins* case. These are: Were the investigative procedures employed by the police impermissibly suggestive? If so, were they so impermissibly suggestive as to create a very substantial likelihood of an irreparable misidentification at trial? See *Higgins, supra*, at 159.

It has been held that even if the procedures were impermissibly suggestive, identification testimony may nevertheless be admissible if it is reliable. The necessary reliability is to be determined from the "totality of the circumstances". Those factors to be considered in determining reliability are "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation". *Neil*

v. *Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972). "Against these factors is to be weighed the corrupting effect of the suggestive identification itself," see *Manson* v. *Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977).

The victims in the instant case were kidnapped, raped and sodomized the night of November 1, 1977. These events occurred between 7:00 p.m. and 11:00 p.m. While at the hospital, late the same evening and into the early morning hours of the next day, the victims provided a police detective with a description of the suspect who had kidnapped them at gun point and who had participated in the subsequent offenses. They described a "Negro male about 30 years old, five foot six, 150 pounds, stocky build, wearing a black hat, armed with an unknown type handgun, silver color, reported to have a mustache, medium length afro hairdo and wearing a white coat."

On November 4, 1977, in separate sessions, the victims were hypnotized by Dr. Marshall Saper, a local psychologist. Dr. Saper testified that he had training in the use of hypnosis and had used hypnosis periodically in his therapy work and in police cases (in his capacity as a reserve police officer). The hypnosis sessions were attended by two police officers, but neither participated in the sessions other than to observe. Dr. Saper testified the hypnosis was done to improve the victims' recollection, and stated that once a state of relaxation and concentration is achieved, the person is taken back in time to the incident in question and asked to describe what they see and hear. The person in such a state is fully awake and conscious of his or her surroundings.

Dr. Saper testified that the victims in the instant case achieved this conscious state of hypnosis. Dr. Saper admitted that once under hypnosis, a subject is open to sug-

gestions. Dr. Saper then testified that "once the subjects were under hypnosis, no suggestion was given to them of any kind by me. The only suggestions given were to get them into hypnosis and that involved suggestions to relax, to imagine a feeling of warmth, to imagine a feeling of relaxation." Dr. Saper stated that prior to the hypnosis session, he did not know what the initial interrogation by police officers had revealed. He did testify, however, that following the session, a detective did tell him that the police had come up with more information than they had prior to the session.

One of the detectives attending the hypnosis session testified that both victims gave the description that their abductor was ". . . around 30, heavy build, but wasn't fat . . . something very strange about his eyes, almost Oriental or Egyptian . . . he had very slight fingers and wore no jewelry . . . he wore a black hat."

Subsequent to the hypnotic sessions, a police artist made a composite drawing from the description provided by one of the victims. This composite was made while the victim was not under hypnosis. This officer testified that the description given for the composite was the same given by this victim during the hypnosis session which he attended. He was the second officer during the hypnosis session.

On November 18 or 19, 1977, the victims were shown an array of photographs, appellant's photo was not among this array, and no identification was made. On November 22, 1977, another array of photographs (13 altogether) was shown to the victims. The photographs were an admixture of color and black/white photographs. Of the 13, a total of four were of the appellant. The victims were separated, the photographs shuffled and handed to the victims. Independently, the victims identified appellant

and two others. One victim's identification was positive. The trial revealed the other victim stated she would have to hear appellant's voice to be completely certain. The record shows this second victim did identify appellant's voice when appellant made a spontaneous outburst during trial.

On December 29, 1977. the victims, accompanied by a female police officer and a female assistant prosecutor, traveled to Murphysboro, Illinois, where appellant was in the custody of Illinois authorities. The victims observed appellant, separately, through the window in a courtroom door, Appellant was inside the courtroom with seven other black males. Each victim was asked to view the men inside and then independently mark on a piece of paper the person they could identify, if anyone. Independently, and without suggestion from authorities or as a result of any conference between them, the victims identified appellant. One victim made a positive identification and the other victim made a tentative identification. The tentative identificaton was made subject to the second victim hearing appellant's voice as referred to above.

The foregoing evidence was before the trial court on appellant's motion to suppress. The motion was overruled.

Trial commenced and both victims testified appellant did not attempt to conceal his face; that they saw his face as he forced his way into their stationwagon and at the house where the assaults were committed upon them. They were questioned about their being blindfolded and both testified they were not blindfolded until after they were ordered to disrobe. One victim testified to being able to see through the sweater which was used as the blindfold on her. Both victims made positive identification of appellant in the courtroom. The second victim became positive in her identification after hearing appellant's voice during an outburst by appellant during trial. Both victims testified

to being able to identify appellant from the photographs and the lineup.

In resolving appellant's point three, this court must answer four questions which arise as a result of appellant's argument. First, was the hypnosis impermissibly suggestive and as an adjunct thereof, does hypnosis render identification inherently unreliable? Second, was the lineup impermissibly suggestive? Third, was the photographic display impermissibly suggestive? Fourth, disregarding suggestiveness, were the identifications reliable?

Regarding question (1) above, appellant argues that hypnosis is "inherently susceptible to the process of suggestion and to the misperception of reality". He further argues that in the instant case, the hypnosis was "impermissibly suggestive because the girls' prehypnosis description was not lacking in detail." In his argument, appellant states "the hypnotic sessions . . . did not reveal any description significantly different or more detailed" than what was given prior to the hypnosis.

The precise question of hypnosis is unique in our state, so this court must look to other jurisdictions for consideration of the question. The majority view holds that pretrial hypnosis does not, as a matter of law, render resulting identification and testimony related thereto inadmissible. The line of authority admitting such evidence reasons that hypnosis aids recall, and later identifications are made from refreshed recollections. Such recollections have been likened to much the same as memories refreshed by diaries, memos and the like. This line of authority also concludes that the effect of the hypnosis is a matter to be weighed by the trier of fact.

A case which takes up the issue of pre-trial identification procedure in particular is *People* v. *Hughes*, 99 Misc.2d 863, 417 N.Y. S.2d 643 (1979). The case involved a rape

victim unable to recall anything about a rape and an assault. The victim was hypnotized and thereafter, able to recall details of the attack and the name of her assailant. The opinion provides a detailed explanation of hypnosis, its history and describes the growing use of hypnosis in criminal investigation. The New York Court stated that in civil cases, hypnosis has been held only to affect the weight of the evidence and that criminal cases dealing with the admissibility of a witness in a criminal case subsequent to hypnosis seem to follow the civil approach. In *Hughes,* 417 N.Y.S.2d at 648, the court concluded, ". . . that testimony, which is hypnotically induced recollection, is not inadmissible as a matter of law. Given a proper foundation of general acceptance in the scientific community and adequate procedural safeguards to insure reliability, this court believes that evidence elicited through hypnosis can be valuable to the determination of the guilt or innocence of those who have been accused of crimes."

For other authority supporting the acceptance of testimony following hypnosis, see *State* v. *Jorgensen,* 8 Or.App. 1, 492 P.2d 312 (1971), which held that hypnosis goes to the weight of the testimony; *People* v. *Smrekar,* 68 Ill.App.3d 379, 24 Ill.Dec. 707, 385 N.E.2d 848 (1979), which held that hypnosis goes to the weight of evidence where (1) the hypnotist was shown to be competent; (2) the evidence reveals no suggestion employed during hypnosis session; (3) other substantial evidence corroborated identification and (4) witness had ample opportunity to view assailant at the time of the occurrence; *Clark* v. *State,* 379 So.2d 372 (Fla.App. 1979) which held that testimony goes to the weight thereof since it is made upon "present recollection refreshed"; *Harding* v. *State,* 5 Md.App. 230, 246 A.2d 302 (1968), cert. denied, 395 U.S. 949, 89 S.Ct. 2030, 23 L.Ed.2d 468 (1969), which held it is a matter of weight of testimony; *United States* v. *Adams,* 581 F.2d

193 (9th Cir. 1978), cert. denied, 439 U.S. 1006, 99 S.Ct. 621, 58 L.Ed.2d 683 (1978), which held that failure to disclose hypnosis is a basis for reversal; *United States* v. *Awkard,* 597 F.2d 667 (9th Cir. 1979), cert. denied, 444 U.S. 885, 969, 100 S.Ct. 179, 460, 62 L.Ed.2d 116, 383 (1979), which held that it goes to weight, if disclosed to the jury; *State* v. *Hurd,* 173 N.J.Super. 333, 414 A.2d 291 (1980), which held that such evidence is admissible if procedural safeguards are followed so that no impermissible suggestions is allowed; *State* v. *McQueen,* 295 N.C. 96, 244 S.E.2d 414 (1978) which held that the credibility of such evidence is for the jury to determine; and *United States* v. *Narciso,* 446 F.Supp. 252 (E.D.Mich. 1977), which held that the possibility of misidentification is not sufficient grounds for exclusion of such evidence where defendant failed to prove "very substantial likelihood of irreparable misidentification".

As contrasted with the above line of authority during oral argument of the instant case, appellant brought to this court's attention the case of *State* v. *Mack,* 292 N.W.2d 764 (Minn. 1980). The court in *Mack* applied the rule of *Frye* v. *United States,* 293 F. 1013 (D.C. Cir. 1923), with the result being that Minnesota holds that testimony of a previously hypnotized witness is inadmissible as a matter of law. The Minnesota court in *Mack* refers to the entry of the victim into a "deep hypnotic state" and expresses concern over the possibilities of prehypnotic and posthypnotic status. In *Mack,* the court simply refuses, under *Frye,* to accept the value of hypnosis as a matter of law.

With the foregoing authority as a background on this issue, pertinent facts in the instant case must again be referred to as they relate to the disposition of this issue. The record shows that both victims had separately and independently given a description of their abductor prior to any hypnotic session. There was no suggestion of any

detail, event, persons or any other specific or general reference to the matter and the information given by the victims was their own statement. The most significant factors which distinguish the prehypnotic session related to the identification of appellant, and those details given during the hypnotic session were the added features of "Oriental or Egyptian eyes, broad flat nose, heavy lips, very slight fingers and no jewelry". Appellant admits that the hypnotic session did not produce a description "significantly different or more detailed" than that previously given.

There is nothing in the instant case which supports appellant's contention than any impermissible suggestion occurred which would result in a "very substantial likelihood of irreparable misidentification". Further, the record of this case supports the in-court identification of appellant by both victims upon present recollection. Appellant made no attempt to conceal his identity at the time of abduction, during the entry into the place where the sexual acts occurred, or during departure from said location. The only questionable period of time regarding the continued possible observation of appellant by the victims is during the time they were blindfolded and assaulted. Even in the latter instance, one victim was able to see through her blindfold during the actual sexual assaults.

[6] Appellant pursues his argument further and attacks the photographic array wherefrom appellant's photograph was selected separately and independently by both victims. The victims were shown an array of photographs on two separate occasions. In the first instance, no selection was made by either victim, but appellant's photo was not among the array. On the second occasion, the victims separately viewed 13 photos. Of this group, appellant appeared in four photos. The victims, without conference with each other, independently identified appellant from the

photographic array. While no case involving the precise factual situation has been found, it has been held that the showing of only one picture of an accused to a witness was not improper, see *State* v. *Parker*, 458 S.W.2d 241 (Mo. 1970) and *State* v. *Greenlaw*, 593 S.W.2d 641 (Mo.App. 1980). There is nothing upon the record of the instant case which shows anything other than the fact that a multiple number of photographs were shown to the victims who in turn independently identified appellant from the photographs. There is nothing of record in the instant case to support appellant's contention that such photographic array was in any manner impermissibly suggestive and such argument is found to be without merit.

[7] Appellant argues still further that the lineup from which both victims separately and independently identified him was impermissibly suggestive. Appellant had been arrested and was in custody in Murphysboro, Illinois. The victims traveled to the courthouse in Murphysboro. The victims observed appellant, along with seven other black men, through a window in a courtroom door. The victims were separated to prevent discussion or comparison between them for purposes of identification. Each victim was given a piece of paper and asked to place a number on the paper if they identified any of the persons inside the courtroom. As the persons were so aligned inside the courtroom, appellant was number four from the left and each victims separately and independently marked that number on their respective pieces of paper.

Appellant argues that he was the shortest of the eight men in the courtroom and the manner in which the eight were located formed a "V" shape with the base of the "V" pointing to appellant, directly implicating him. The facts on the record dispel appellant's contention. In the first instance, three of the other seven men were nearly the same height as appellant. In addition, the record reveals that

while from left to right the heights of the individuals descended down to appellant, the persons on appellant's far right did not ascend in any order of height toward the location of appellant. It has been held that dissimilarity in height does not provide sufficient basis to hold that a lineup was permissibly suggestive, see *State* v. *Gant*, 586 S.W.2d 755 (Mo.App. 1979); *State* v. *Bivens*, 558 S.W.2d 296 (Mo.App. 1977) and *Gaitan* v. *State*, 464 S.W.2d 33 (Mo. 1971). There is no merit to appellant's argument that the identification of appellant was unreliable because the lineup was impermissibly suggestive.

[8] There is nothing upon the record of this case to support appellant's contention that the identification of appellant was unreliable upon the premise of impermissible suggestiveness. Appellant's argument that employment of hypnosis rendered all identification unreliable is by this court rejected. It is the opinion of this court that absent the showing that use of hypnosis was impermissibly suggestive so that "a very substantial likelihood of irreparable misidentification" occurred, the evidence based thereon was not inadmissible as a matter of law, but rather such hypnotic process goes to the weight of the testimony of the evidence and is a matter for determination by the trier of fact.

Even in the absence of impermissible suggestion, were the identifications of appellant herein still reliable? *State* v. *Higgins* and *Manson* v. *Braithwaite, supra*, mandate that the key to admissible identification is the reliability of that identification.

[9] As discussed above, the record herein reflects no impermissible suggestiveness in the identification of appellant. The task of this court under existing authority is to review the reliability of identification from the "totality of the circumstances", see *Neil* v. *Biggers, supra*. The fac-

tors to be considered in the "totality of the circumstances" include the "opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontations", *Neil* v. *Biggers, supra,* 409 U.S. at 199, 93 S.Ct. at 382. See also *State* v. *Higgins, supra,* at 160 and *State* v. *Kent,* 602 S.W.2d 799 (Mo.App. 1980).

[10] In the instant case, the evidence was uncontroverted that appellant forced his way into the victim's stationwagon. Appellant made no attempt to conceal his face. Appellant walked to the location of the sexual assaults with both victims, again making no effort to conceal his face. Prior to the actual sexual assaults, both victims, while inside the house, observed appellant's face and the rest of his appearance. Even during the actual assaults, one victim could see through her blindfold. Hence, there was more than ample opportunity to view the appellant "at the time of the crime". Both victims were attentive to what was going on. Both victims provided police officers a description within a short time following the assault upon them. That description varied little and without marked difference from subsequent identification by both victims. The consistency of the victims' identification tends to establish the degree of attention and accuracy of the victims' prior descriptions. As to the level of certainty, one victim continuously and without reservation identified appellant by verbal description, the photographic array, the lineup and a positive in-court identification. The other victim expressed only one reservation as to complete and total positive identification, and that was the hearing of appellant's voice. The identity of the voice which led to an unequivocal positive identification by the second victim occurred when

appellant made repeated outbursts during the course of trial in the courtroom. Regarding the final element, time, the record shows a general description of the night of the assault. This was followed by the observance of a photographic array three weeks later. That procedure was followed by the lineup observation some thirty-seven days later. It cannot be said that an unwarranted amount of time lapsed between the time of the crime and the time of confrontation for purposes of competent identification.

Considering the totality of the circumstances, the standard set forth has been met, thereby rendering the identification of appellant reliable for purposes of its admissibility.

As set forth above, the court, at the outset, posed four questions which the court felt necessitated an answer in disposition of appellant's final point. Question one, based upon the foregoing, is answered in the negative as this court finds the use of hypnosis under the particular facts and circumstances of this case was not inherently unreliable and such matter does not go to its inadmissibility as a matter of law, rather, it is a matter to be weighed by the trier of fact. The evidence upon this record does not support appellant's contention that the hypnosis session revealed any impermissible suggestion. Regarding questions two and three, they are answered in the negative as the record fails to support the contention that the photographic array and the police lineup contained any element of impermissible suggestion. Question four is also answered in the negative because when the "totality of the circumstances" is considered from this record, the identification of appellant upon the reasons set forth above renders such identification reliable for purposes of its admission in evidence.

Point three is ruled against appellant.

For the foregoing reasons, that portion of the judgment relating to the convictions for armed criminal action is reversed. For the foregoing reasons, that portion of the judgment relating to the convictions for kidnapping, rape and sodomy is in all respects affirmed.

All concur.

STATE of Missouri,
Plaintiff-Respondent,

v.

Randy Lee SINCLAIR,
Defendant-Appellant.
No. 11681.

Missouri Court of Appeals,
Southern District,
Division Two.

Oct. 1, 1980.

Motion for Rehearing or Transfer to Supreme Court
Denied Oct. 10, 1980.

Application to Transfer Denied
Nov. 12, 1980.

Defendant was convicted on a jury verdict before the Circuit Court, Greene County, John C. Crow, J., of second-degree assault and armed criminal action and was sentenced as a persistent offender, and he appealed. The Court of Appeals, Billings, P. J., held that the trial court did not abuse its discretion in failing to declare a mistrial. The sentence and judgment for armed criminal action was reversed and set aside.

Affirmed in part; reversed and vacated in part.

Criminal Law 867

In prosecution for second-degree assault, assuming that testimony of defendant's possession, several days prior to stabbing, of a knife similar to that found near the scene of the crime was objectionable, trial court, which instructed jury to disregard the testimony, did not abuse its discretion in failing to declare mistrial. V.A.M.S. § 565.060.

John Ashcroft, Atty. Gen., Nancy D. Kelley, Asst. Gen., Jefferson City, for plaintiff-respondent.

Lawrence A. Smith, Springfield, for defendant-appellant.

BILLINGS, Presiding Judge.

Defendant Randy Lee Sinclair was convicted of second degree assault [§ 565.060, RSMo 1978] and armed criminal action [§ 571.015, RSMo 1978]. He was sentenced as a persistent offender [§ 558.016, V.A.M.S.] on the assault conviction to an eight-year prison term. Pursuant to the jury's verdict, the court sentenced him to a thirty-year term for armed criminal action.[1] By reason of *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc 1980), we are required to reverse and set aside the sentence and judgment for armed criminal action. We affirm the sentence and judgment for assault.

The sufficiency of the evidence to sustain the assault conviction is not questioned. There was substantial evidence from which the jury could find that the defendant stabbed an elderly man several times with a large blade "buck" pocketknife. A short time before the two men alighted from a city bus the defendant told a bus passenger that he had a knife in his boot. Defendant was observed follow-

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[1]The trial court ordered the sentence for armed criminal action be served first and that the assault sentence was to run consecutive to the armed criminal action sentence. The court further ordered that both sentences were to run consecutive to another sentence previously entered.

ing the elderly man and witnesses saw a knife in his hand as he was striking his victim. Defendant was seen pitching an object from his hand at the scene of the crime and a "buck" knife was found nearby.

A police officer testified defendant had a similar "buck" knife in his possession a few days before the date of the crime. Defendant objected and requested this testimony stricken. The court sustained the objection and instructed the jury to disregard the testimony. Defendant then moved for a mistrial which the court denied.

Defendant contends the testimony of his having a similar knife prior to the time in question "was so prejudicial as to destroy the very basis of [his] case" because he testified he "had no knife with him on the night in question." We frankly have difficulty in understanding defendant's claim of prejudice and are not enlightened by the argument portion of his brief. His theory, if it be such, is not developed in the argument and we find no authorities cited therein to support his contention. Rather than dismiss the point [*State* v. *Schulten*, 529 S.W.2d 432 (Mo.App. 1975)], and assuming for some reason the testimony was objectionable, we, nevertheless, find no abuse of discretion by the trial court in failing to declare a mistrial. *State* v. *Johnson*, 504 S.W.2d 23 (Mo. 1973); *State* v. *Petrik*, 550 S.W.2d 613 (Mo.App. 1977).

The judgment is affirmed.

HOGAN and MAUS, JJ., concur.

STATE of Missouri,
Plaintiff-Respondent,

v.

Willie TUNSTALL, Defendant-Appellant.
No. 42034.

Missouri Court of Appeals,
Eastern District,
Division Three.

Oct. 7, 1980.

Motion for Rehearing and/or Transfer to Supreme Court Denied Nov. 14, 1980.

Application to Transfer Denied Dec. 15, 1980.

Defendant was convicted in the Circuit Court, City of St. Louis, Floyd McBride, J., of first-degree robbery and armed criminal action, and he appealed. The Court of Appeals, Dowd, P. J., held that conviction of armed criminal action and attempted robbery violated rule against double jeopardy and armed criminal action conviction could not stand.

Affirmed in part and reversed in part.

Criminal Law 200(1)

Conviction for attempted robbery and armed criminal action subjected defendant to multiple punishment for same offense in violation of state and federal constitutional prohibitions prohibiting double jeopardy and, thus, sentence for armed criminal action would be reversed, U.S.C.A.Const. Amend. 5; V.A.M.S.Const. Art. 1, § 19.

Robert C. Babione, Public Defender, Joseph Webb, Asst. Public Defender, St. Louis, for defendant-appellant.

John Ashcroft, Atty. Gen., Paul Robert Otto, Steven W. Garrett, Asst. Attys. Gen., Jefferson City, George A. Peach, Circuit Atty., St. Louis, for plaintiff-respondent.

DOWD, Presiding Judge.

Upon jury verdict, appellant was convicted of attempted first degree robbery and armed criminal action. Appellant was sentenced to consecutive terms of imprisonment of 10 years for attempted robbery and 6 years for armed criminal action.

In his appeal from his convictions, appellant raises only one contention. He argues his convictions for attempted robbery and armed criminal action subjected him to multiple punishment for the same offense in violation of state and federal constitutional provisions prohibiting double jeopardy.

Our Supreme Court has held that conviction of armed criminal action and the underlying felony constitutes a violation of the rule against double jeopardy and that the armed criminal action conviction cannot stand. *Sours* v. *State*, 593 S.W.2d 208 (Mo. banc 1980). Our Supreme Court reinstated and reaffirmed their holding in *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc 1980). Although the underlying felony in the above-cited Supreme Court cases was first degree robbery, the holding of the above-cited cases would also be applicable if the underlying felony were attempted first degree robbery. *State* v. *Smith*, 607 S.W.2d 737 (Mo. App. 1980).

Appellant's conviction of and sentence for attempted first degree robbery is affirmed. Appellant's conviction of and sentence for armed criminal action is reversed.

REINHARD and CRIST, JJ., concur.

STATE of Missouri, Respondent,

v.

Timothy CREWS, Appellant.
No. 41073.

Missouri Court of Appeals,
Eastern District,
Division Three.

Sept. 23, 1980.

Motion for Rehearing and/or Transfer to Supreme Court Denied Nov. 14, 1980.

Application to Transfer Denied Dec. 15, 1980.

Defendant was convicted by the Circuit Court, City of St. Louis, Daniel T. Tillman, J., of robbery, kidnapping, and armed criminal action, and defendant appealed. The Court of Appeals, Crist, J., held that: (1) evidence supported conviction of two separate crimes, robbery and kidnapping, even though defendant contended that evidence showed seizure, detention, and asportation of victim was merely incidental to crime of robbery, and (2) no error occurred in not striking two veniremen for cause by reason of alleged bias on their part.

Armed criminal action conviction reversed and robbery and kidnapping convictions affirmed.

1. Kidnapping 1

Kidnapping is the forcible seizure, confinement, inveiglement, or enticement of another with intent to asport or secretly confine the other against his will.

2. Criminal Law 29

Evidence supported conviction of two separate crimes, robbery and kidnapping, even though defendant contended that evidence showed seizure, detention, and asportation of victim was merely incidental to crime of robbery.

3. Jury 90, 91

No error occurred in not striking two veniremen for cause by reason of alleged bias on their part, where, although one venireman knew one of state's prospective witnesses and county police officer, and other venireman knew circuit attorney, both said they were not biased and could give defendant fair trial.

4. Jury 131(10)

Trial court had no duty to question further about any possible bias of venireman, who knew one of state's prospective witnesses and county police officer, and another venireman, who knew circuit attorney, where answers by these veniremen that they were not biased and could give defendant fair trial were not equivocal.

Leonard W. Buckley, Jr., St. Louis, for appellant.

John D. Ashcroft, Atty. Gen., Paul Robert Otto, Asst. Atty. Gen., Jefferson City, George A. Peach, Circuit Atty., St. Louis, for respondent.

CRIST, Judge.

Defendant was convicted by a jury of robbery, kidnapping, and armed criminal action. The trial court assessed consecutive sentences under the Second Offender Act at thirty years, ten years, and thirty years, respectively.

We reverse the armed criminal action conviction as mandated by *Sours* v. *State,* 603 S.W.2d 592 (Mo. banc 1980) (*Sours II*). We affirm the robbery and kidnapping convictions.

[1, 2] Defendant asserts the evidence at trial showed the seizure, detention, and asportation of the victim was merely incidental to the crime of robbery and therefore the evidence was insufficient to prove the intent to secretly confine—a required element of kidnapping. Kidnapping is the forcible seizure, confinement, inveiglement, or enticement of another with the intent to asport or secretly confine the other against his will. *State* v. *Gormon*, 584 S.W.2d 420, 425 (Mo.App. 1979); *State* v. *Johnson*, 549 S.W.2d 627, 631 (Mo.App. 1977). Defendant relies on *People* v. *Levy*, 15 N.Y.2d 159, 204 N.E.2d 842, 256 N.Y.S.2d 793 (1965), *modified*, 15 N.Y.2d 910, 206 N.E.2d 653, 258 N.Y.S.2d 646 (1965), *cert. denied*, 381 U.S. 938, 85 S.Ct. 1770, 14 L.Ed.2d 701 (1965). In *Levy*, the defendant forced his way into a car and in the course of a twenty minute ride robbed the occupants of the car. The *Levy* court held the defendant was guilty of robbery but not guilty of kidnapping as the detention of the victims was only incidental to the robbery. *Levy, supra*, at 204 N.E.2d 843-45, 256 N.Y.S.2d 795-97. The present facts evidence a more extensive asportation and confinement.

The victim was leaving a P.T.A. meeting at a school on Kingshighway and Reber in St. Louis, Missouri, about 8:30 in the evening. She was grabbed by defendant and another man. Defendant pointed a gun at her right temple and told her he would blow her head off. The victim offered her car keys and purse to her assailants. She asked them to leave her alone and informed them she was two months pregnant. They took $34.00 from her purse and then knocked her down before pushing her into her car. Defendant drove the three of them down Kingshighway, turned on to Interstate 44, and then drove west. The two men discussed holding her for ransom in order to get money from her husband. They returned to the school and forced her to crouch on the floor of the car while in the

vicinity of the school. Defendant's accomplice picked up another car. After a service station stop, the two cars proceeded into Jefferson County, Missouri, where the victim was forced to get into the other car. The victim was then driven back to St. Louis where she was left with her car at the Jamieson exit on Interstate 44. This evidence supports the conviction of two separate crimes—robbery and kidnapping. *Gorman, supra; Johnson supra.*

[3, 4] Defendant also contends the trial court erred in not striking two veniremen for cause by reason of bias on the part of the veniremen. One venireman knew one of the state's prospective witnesses and a St. Louis County police officer. The other knew George Peach, St. Louis Circuit Attorney. Both said they were not biased and could give the defendant a fair trial. We find no error. *State* v. *Eaton,* 504 S.W.2d 12, 17 (Mo. 1973); *State* v. *Cuckovich,* 485 S.W.2d 16, 22-23 (Mo. banc 1972); and *State* v. *Shoemaker,* 183 S.W. 322, 324 (Mo. 1916). Since the answers by the veniremen were not equivocal, the trial court had no duty to question the veniremen further about any possible bias. *State* v. *Carter,* 544 S.W.2d 334, 337 (Mo.App. 1976).

The armed criminal action conviction is reversed. The robbery and kidnapping convictions are affirmed.

DOWD, P. J., and REINHARD, J., concur.

STATE of Missouri,
Plaintiff-Respondent,

v.

Terry CREWS, Defendant-Appellant.
No. 41161.

Missouri Court of Appeals,
Eastern District,
Division Four.

Sept. 9, 1980.

Motion for Rehearing and/or Transfer to Supreme Court Denied Oct. 17, 1980.

Application to Transfer Denied Dec. 15, 1980.

Defendant was convicted before the Circuit Court, City of St. Louis, Thomas W. Challis, J., of first-degree robbery, kidnapping and armed criminal action, and he appealed. The Court of Appeals, Smith, P. J., held that: (1) in such proceeding in which defendant accepted a hybrid type of representation, failure to obtain written waiver of counsel from defendant was not error; (2) it was established that defendant had been adequately warned of danger of self-representation; (3) certain order could have been reasonably interpreted as preliminary to a second order directing a psychiatric evaluation and, thus, that no response was necessary to certain report even if defendant wished to contest it or desired another examination, but fact that defendant, who, on entry of a second order, became aware that such interpretation was contrary to trial court's interpretation, failed to call the inconsistency to trial court's attention precluded defendant from attacking the procedure followed or to take advantage of the inconsistency on appeal; (4) evidence before trial court afforded no basis

for conclusion that reasonable cause existed to believe that defendant lacked competency to stand trial so as to mandate a competency evaluation; (5) giving approved instruction, which related to consideration of separate offenses, was not prejudicial; 6) failure to declare mistrial when police officer referred to defendant's oral statement which had been suppressed was not error; but (7) conviction for armed criminal action and the underlying felony would constitute a violation of rule against double jeopardy.

Judgment of conviction for armed criminal action reversed; other judgments of conviction affirmed.

1. Criminal Law 641.4(4)

In criminal proceeding wherein defendant accepted a hybrid type of representation under which he was allowed to try the case with the assistance of counsel, failure to obtain written waiver of counsel from defendant was not error. V.A.M.S. § 600.051.

2. Criminal Law 641.4(4)

In criminal proceeding wherein defendant accepted hybrid type of representation under which he was allowed to try the case with the assistance of counsel, the extensive warnings given to defendant in regard to hazard of self-representation and the questioning by court and defendant's responses thereto established that he was adequately warned and made his choice with full knowledge and understanding of what he was doing.

2. Criminal Law 641.4(4)

Defendant's point relied on, which was to effect that trial court erred in its order finding defendant mentally fit to proceed with trial, that the finding was based on psychiatric evaluation not complying with requirements of certain statutes and that rights under certain federal and

state constitutional provisions had been violated, was inadequate, in view of fact that the point failed to explain in what way the psychiatric evaluation did not comply with statutory requirements and failed to explain in which way actions of the court violated defendant's constitutional rights. V.A.M.S. §§ 552.010 et seq., 600.051; U.S.C.A. Const. Amends. 5, 6, 14; V.A.M.S.Const. Art. 1, §§ 10, 18(a).

4. Mental Health 434

Question of competency to stand trial cannot be waived by going to trial.

5. Criminal Law 986(3)

Oral justification or reason given by court is not a part of the order and cannot be used to contradict it.

6. Criminal Law 1035(2)

Order, which was entered after defendant filed second motion for psychiatric examination and which required in effect that director of forensic services conduct preliminary evaluation for purpose of determining whether it was necessary to send defendant for second psychiatric evaluation, could have been reasonably interpreted as preliminary to a second order directing psychiatric evaluation and, thus, that no response was necessary to director's report even if defendant wished to contest it or desired another examination, but fact that defendant, who on entry of a second order, became aware that such interpretation was contrary to trial court's interpretation, failed to call the inconsistency to trial court's attention before trial precluded defendant from attacking the procedure followed or taking advantage of the inconsistency. V.A.M.S. § 552.020, subds. 2, 4, 6.

7. Mental Health 434

Requirement that there be a competency evaluation if judge has reasonable cause to believe that accused has

mental disease or defect excluding fitness to proceed is a continuing obligation of the trial court throughout the criminal proceeding. V.A.M.S. § 552.020, subd. 2.

8. Mental Health 432

Mere fact that trial court granted defendant's motion for a second psychiatric examination did not establish that there was reasonable cause to believe that he lacked competency to proceed in criminal proceeding. V.A.M.S. § 552.020, subd. 2.

9. Mental Health 432

Test of competency to stand trial is whether defendant has sufficient ability to consult with his lawyer with reasonable degree of rational understanding and whether a defendant has a rational as well as factual understanding of proceedings against him.

10. Mental Health 434

Evidence before trial court in criminal proceeding had afforded no basis for a conclusion that reasonable cause existed to believe that defendant lacked competency to stand trial so as to mandate a competency evaluation. V.A.M.S. § 552.020, subd. 2.

11. Criminal Law 822(1)

In proceeding in which defendant was convicted of armed criminal action and other offenses, giving approved instruction, which related to consideration of separate offenses and which could possibly be confusing in an armed criminal action, was not prejudicial where the instructions, when read together, properly instructed the jury. MAI Criminal No. 2.70.

12. Criminal Law 867

Refusal to declare mistrial when, in criminal proceed-

ing, police officer, who was unaware that defendant's oral statement had been suppressed, referred to such statement in a responsive answer to question posed by defendant was not abuse of discretion, in light of fact that such matter had been injected into the case by defendant.

13. Criminal Law 200

In proceeding in which defendant had been convicted of first-degree robbery, kidnapping and armed criminal action, the conviction for armed criminal action had to be reversed, in light of fact that a conviction of such offense and the underlying felony would constitute a violation of rule against double jeopardy. U.S.C.A.Const. Amend. 5.

Robert C. Babione, Public Defender, Mary K. Wefelmeyer, Asst. Public Defender, St. Louis, for defendant-appellant.

John D. Ashcroft, Atty. Gen., Paul R. Otto, Asst. Atty. Gen., Jefferson City, George A. Peach, Circuit Atty., St. Louis, for plaintiff-respondent.

SMITH, Presiding Judge.

Defendant appeals from his conviction by a jury of robbery first degree, kidnapping, and armed criminal action and resultant sentences by the court under the second offender act of 30, 10, and 30 years to be served consecutively. We affirm the convictions for robbery and kidnapping and reverse the conviction for armed criminal action.

The evidence supported a factual finding that defendant and his brother robbed the victim at gunpoint, placed her into an automobile against her will, took her into two other counties where other offenses were committed, and returned her to the City of St. Louis some two and one-half hours later. The victim was a school teacher seven months

pregnant at the time. Defendant testified to an alibi and called witnesses to support that claim.

[1] On appeal defendant raises four points, none of them relating to the sufficiency of the evidence. It is first contended that the trial court erred in allowing the defendant to represent himself and in failing to have a written waiver of counsel signed by defendant pursuant to Sec. 600.051, RSMo 1978. Defendant did request that he be allowed to represent himself without counsel. This request was not granted by the court. Rather defendant was allowed to try the case with counsel available to assist and advise him. This was permitted only after extensive questioning by the Court during which the hazard of self-representation was explained thoroughly to defendant, and during which defendant demonstrated a fairly complete rudimentary understanding of legal and courtroom procedures. Defendant had available to him throughout the trial the assistance of counsel which he utilized freely and frequently. Counsel performed certain legal work such as obtaining subpoenas. In addition he approached the bench and appeared in chambers with defendant during conferences, advised the court on occasion of the legal basis for defendant's objections and contentions, conferred with defendant concerning objections and questioning of witnesses, explained to defendant the instructions which defendant could request be given, prepared and argued the motion for new trial, argued the question of the sentences to be imposed, and prepared and filed the notice of appeal. The representation accorded to defendant is frequently referred to as "hybrid." *State* v. *Edwards,* 592 S.W.2d 308 (Mo.App. 1979). In essence defendant served as co-counsel with an attorney. He had the opportunity to actually try the case with the assistance throughout of counsel.

In *Peterson* v. *State,* 572 S.W.2d 475 (Mo. banc 1978),

the Supreme Court held that Sec. 600.051 requires that a written waiver of the assistance of counsel be obtained and that the failure to obtain such a written waiver is prejudicial error. In *State* v. *Burgin*, 539 S.W.2d 652 (Mo.App. 1976); *State* v. *Johnson*, 586 S.W.2d 437 (Mo.App. 1979); and *State* v. *Tyler*, 587 S.W.2d 918 (Mo.App. 1979) the courts held that hybrid representation is not a waiver of counsel but on the contrary is the utilization of the assistance of counsel and Sec. 600.051 is not therefore applicable. Defendant here accepted the hybrid representation and the court did not err in failing to obtain a written waiver of counsel.

[2] We need not determine whether bench warnings of the danger of self-representation are required in hybrid representation cases, or whether the same requirement of "intelligent and knowing waiver" needs to be met as that required in no-counsel cases. *See State* v. *Edwards, supra.* Suffice it to say here that the extensive warnings and questioning by the court and defendant's responses thereto establish that defendant was adequately warned and made his choice with full knowledge and understanding of what he was doing. *State* v. *Nicolosi*, 588 S.W.2d 152 (Mo.App. 1979). We find no merit in defendant's first point.

Defendant's second point we set forth verbatim:

> "The trial court erred in its order of September 18, 1978 wherein it found that the defendant had mental fitness to proceed with the trial. This finding was based on a psychiatric evaluation of August 28, 1978 that did not comply with the requirements of Chapter 552 of the Revised Statutes of Missouri, Supp. 1971. This violated defendant's rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and under Article I, Section 10 and 18(a) of the Missouri Constitution."

The point arises in the folowing context. On May 19, 1978, defendant, represented by an appointed attorney, filed a motion for psychiatric examination. That motion was denied. On July 28, 1978, defendant, now represented by retained counsel, filed a second motion for psychiatric examination. At the hearing on that day defendant's attorney stated that shortly before a previous trial setting defendant had cut himself on the arm in an attempt to commit suicide.[1] Counsel further stated he had had difficulty obtaining information from defendant although he seemed willing to cooperate; that defendant appeared to have difficulty thinking about or concentrating on the case; that defendant had difficulty remembering the evening on which the offense occurred. Counsel further indicated that he had been told that defendant had some history of glue sniffing, which counsel understood could cause brain damage. Counsel did testify that he had examined a report of mental examination, made in May 1977 in another case, which had found defendant mentally competent to stand trial. Counsel stated that defendant had not wanted that medical examination, had not cooperated in it and had not received an electroencephalogram because of his non-cooperation. On cross-examination counsel stated that the 1977 report indicated that defendant was anti-social. He also admitted that defendant had an awareness of the charges against him; that the absence of communication by defendant had been recent; that a month before the hearing defendant had been tried on another charge arising from conduct occurring at approximately the same time as the charges in this case and that in that case defendant

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[1]The trial court examined the scars from this attempt. At the argument on the motion for new trial the court stated it had placed no credibility to this "attempt," feeling that the scar location did not indicate a bona fide suicide attempt but rather an attempt to obtain a continuance or to come under "Drope" (*Drope* v. *Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975).

had taken the stand and testified. Counsel also stated that defendant had made statements about hanging himself. After the hearing on August 22, 1978, the court entered the following order:

"The Court having been informed that the above-named defendant while in confinement has inflicted injury to his own person, therefore, the court, over the objections of the State, hereby sustains the defendant's motion for a second psychiatric examination and evaluation.

"Causes ordered continued at the request of the defendant.

"The Court orders that Dr. Bun Tee Co, Jr. Director of Forensic Services, Malcolm Bliss Mental Health Center or a designee of his staff proceed to the City Jail at 124 S. 14th Street, St. Louis, Mo. at a time satisfactory to Dr. Co to conduct a preliminary evaluation with the purpose of determining whether it is necessary to send the defendant to Fulton State Hospital for a second psychiatric evaluation or whether said examination and evaluation may be performed on an out-patient basis at Malcolm Bliss Mental Health Center."

On September 18, 1978 the court entered the following order:

"Pursuant to a prior Order of the Court dated August 22, 1979, (sic) a report reflecting the psychiatric evaluation of the defendant dated August 28, 1978 signed by Dr. Bun Tee Co, Jr., Director, Forensic Services, Malcolm Bliss Health Center, has heretofore been filed with the Court on September 1, 1978.

"Accordingly, based upon this report dated Au-

gust 28, 1978 and the report of the psychiatric examination and evaluation performed at the Fulton State Hospital dated June 15, 1977 in a cause of action which was pending in St. Louis County and said report dated June 15, 1977 having been admitted into evidence in Cause # 77-2281-A, and the Court further taking notice of the entire record finds on the basis of the psychiatric reports dated August 28, 1978 and June 15, 1977 that the above-named defendant has mental fitness to proceed.

"Causes removed from Mental Docket and set for trial on Monday, October 23, 1978 in Division #24."

Trial began on the case on November 13, 1978. No reference to a mental examination or to defendant's competency appears in the record after the order of September 18, 1978, until the motion for new trial.

[3, 4] Defendant's point relied on is inadequate in specifying in what way the trial court erred. Initially, it fails to explain in what way the psychiatric evaluation of August 28 did not comply with the requirements of Chapter 552. This becomes even more critical because appellant has not included as a part of the record before us either that report or the earlier evaluation of June 1977. Nor are we advised in what way the actions of the court violated defendant's various constitutional rights. Inasmuch as the question of competency to stand trial cannot be waived by going to trial (*State* v. *Clark*, 546 S.W.2d 455 (Mo.App. 1977) [14-16]) and is of fundamental constitutional import (*Pate* v. *Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966)) we will attempt to address the issues which we believe are arguably before us. These appear to be two-one procedural, the other substantive.

[5, 6] The procedural question is whether the initial order of August 22 mandated an evaluation other than that

performed by Dr. Co in the City Jail. We must presume that the two psychiatric reports which are not before us supported the court's decision that defendant had the mental competency to stand trial. Did the wording of the August order lead the defendant to believe that a further evaluation would be made other than Dr. Co's and thereby preclude him from challenging the Co evaluation under the provisions of Sec. 552.020.4 & 6?[2] On the face of the order it appears the court had determined that a further evaluation would be made and that the Co examination was limited to a determination of where the examination would be conducted, not whether it would be conducted. The prosecutor and the court stated at the hearing on the motion for new trial that they believed the order did not mandate an evaluation but merely provided for a preliminary determination of where the evaluation should be conducted if the court decided that such an evaluation was needed. The oral justification or reason given by the court is not a part of the order and cannot be used to contradict

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[2]552.020 R.S.Mo. 1978

"4. The clerk of the court shall deliver copies of the report to the prosecuting or circuit attorney and to the accused or his counsel. The report shall not be a public record or open to the public. Within five days after the filing of the report, both the accused and the state shall, upon written request, be entitled to an order granting them an examination of the accused by a physician of their own choosing and at their own expense. If such examination is ordered, a report of the examination made by the examining physician shall be furnished to the court and to the opposing party.

6. If neither the state nor the accused nor his counsel contests the opinion referred to in subsection 3, subdivision (3), of this section relative to fitness to proceed, the court may make a determination and finding of record on the basis of the report filed or may hold a hearing on its own motion. If any such opinion is contested the court shall hold a hearing on the issue. The report or reports may be received in evidence at any hearing on the issue but the party contesting any opinion therein relative to fitness to proceed shall have the right to summon and to cross-examine the physicians who rendered such opinion and to offer evidence upon the issue."

the order. *Green* v. *First National Bank of Kansas City*, 236 Mo.App. 1257, 173 S.W.2d 763 (1943). On the other hand it is also apparent that the August order did not contain all of the specifics required by Sec. 552.020.2 and was not therefore the order mandated by that section. We do not believe it unreasonable for defendant and his attorney to interpret the order as a preliminary to a second order directing a psychiatric evaluation and to thereby conclude that no response was necessary to the Co report even if defendant wished to contest it or desired another examination. That does not, however, close the matter.

Upon entry of the September order denying a mental evaluation, it became apparent that the interpretation which defendant now contends he placed upon the August order (and which we find reasonable) was not the same as that placed upon it by the court. Yet at no time prior to the conclusion of the trial two months later was this difference in interpretation called to the trial court's attention No effort was made to reopen the September order for reconsideration, to request another examination under Sec. 552.020.4, or to contest the opinion as provided in Sec. 552.020.6. There is nothing in the record to indicate that such an effort would have been unsuccessful or that the trial court would have been unwilling to reexamine its September order in light of the difference of opinion generated by its August order. Judicial procedures are not a game, certainly not when they involve matters as important as competency to stand trial. It was incumbent upon defendant to call the alleged inconsistency in the two orders to the court's attention before trial if he felt aggrieved thereby. His failure to do so precludes him from now attacking the procedure followed or to take advantage of the inconsistency in the orders.

[7, 8] The substantive issue reaches the more basic question of whether the evidence before the trial court

mandated a competency evaluation whatever procedure was followed. Sec. 552.020.2 requires such an evaluation "whenever any judge . . . has reasonable cause to believe that the accused has a mental disease or defect excluding fitness to proceed . . . ." This is a continuing obligation of the trial court throughout the criminal proceeding. *State* v. *Clark, supra*, [14-16]. We must look therefore to the entire record to determine whether it establishes reasonable cause to believe that defendant lacked competency to proceed. We do not find it does. The court's order of August does not of itself establish such cause. As we said in *Jones* v. *State*, 505 S.W.2d 96 (Mo.App. 1974) [1-3]:

> "The mere fact that a trial judge grants, on motion, a psychiatric examination does not automatically establish that a bona fide doubt exists as to the defendant's competency to stand trial."

Simply out of an abundance of caution, a judge may grant such an examination where defendant has failed to establish specific reasonable cause to believe a mental disease or defect exists. We also must presume that the two psychiatric reports before the court did not establish "reasonable cause." The purported suicide attempt was discounted by the court, who viewed the scars, as not bona fide. The description of the location of the scars stated by the judge would support that assessment.[3] The order of August did not state that defendant had attempted suicide but only that he had inflicted injury upon himself. The statement of a history of glue sniffing was unsup-

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[3] "I gave no weight to this so-called suicide attempt at all because of the area where the cuts were, one being on the top of the bone, . . . on the upper portion of the left wrist, and the other being in the muscle area of the left arm. I think that anyone who makes a bona fide suicide attempt can get closer to the area where some chance of success might be." Defendant did not dispute the factual statement of the location of the scars although given that opportunity.

ported by anything except counsel's statement admittedly based upon hearsay. Furthermore, what that history consisted of one episode, occasional episodes or constant episodes—was not stated, nor was there any evidence of what if any effect this history might have on his mental state other than counsel's understanding it might have some. Nor does it appear whether this history predated the 1977 evaluation and was considered therein. Defendant had been incarcerated five months after the prior examination and had remained incarcerated through the trial and there was no indication that he was presently "glue-sniffing." Nor was the alleged inability to communicate with counsel dealt with specifically. The court was also aware that defendant had shortly before testified in another case in his own behalf concerning an alleged crime occurring at approximately the same time as the ones on trial. Immediately prior to trial the court questioned the defendant at length in regard to his self-representation. His answers demonstrated full understanding of the proceedings and a better than average layman's understanding of the legal and courtroom procedures. Defendant's handling of the case through trial demonstrated an acute understanding of the testimony, many of the rules of evidence, legal principles and courtroom procedure and protocol. His testimony gave detailed and precise information on his activities and whereabouts on the night of the crimes. His questioning of witnesses, both his and the State's, while less fulsome than might have been a lawyer's, demonstrated his understanding of the points he wished to make and his ability to make them. He conferred frequently throughout the trial with his co-counsel and in those few instances where these conferences are of record demonstrated his understanding of the advice or explanation given.

[9, 10] The test of competency to stand trial is

whether the defendant has sufficient ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him. *Dusky* v. *United States,* 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960); *Martin* v. *State,* 558 S.W.2d 701 (Mo.App. 1977) [4]; *Jones* v. *State, supra* [1-3]. On the record before us, we find no basis for concluding that reasonable cause existed to believe defendant lacked that competency. *State* v. *Haley,* 603 S.W.2d 512 (Mo. 1980). The record strongly supports the opposite conclusion.

[11, 12] Defendant's next point is that the court erred in utilizing MAI-CR 2.70 in this case because the case included a charge of armed criminal action. We acknowledged in *Simms* v. *State,* 568 S.W.2d 801 (Mo.App. 1978) that MAI-CR 2.70 contained the possibility of confusion in an armed criminal action case, but held that no prejudice existed because the instructions read together properly instructed the jury. The same is true here. In *State* v. *Tilley,* 569 S.W.2d 346 (Mo.App. 1978) we upheld the use of a modified MAI-CR 2.74 in an armed criminal action case against a similar attack. *Tilley* does not represent, as defendant contends, an implied overruling of *Simms* or a judicial direction to utilize 2.74. Both cases recognized that the mandatory pattern instructions do not contain (mandatory in multiple count cases) which is designed to cover armed criminal action cases. Both *Simms* and *Tilley* recognized, therefore, that inasmuch as some instruction on multiple counts is required and none is truly applicable, no prejudicial error exists if the instruction utilized, combined with the other instructions and verdict forms, properly advises the jury of what it must find. Those two cases did not establish any particular method of handling this vexing problem, but only held that the method utilized in each of those cases was not prejudicially erroneous.

Defendant's next point is that the trial court erred in failing to declare a mistrial when a police officer witness for the State referred to an oral statement given by defendant which had been suppressed. The matter occurred during defendant's cross-examination of the witness. Defendant had made a video-tape confession which was admitted into evidence. He also gave an oral statement prior to the video tape which the court suppressed because not revealed on discovery. The questioning and answers of which defendant complains were as follows:

"Q. Before this video tape was played you did discuss with me about this statement, didn't you?

A. Correct, sir.

Q. Who all was present at that interrogation?

A. I don't understand, what interrogation? The video tape or your statement prior to making the video?

Q. What I'm talking about is among you who was the other officers that made the promises that if I'd say what they wanted to say—?

A. I never made you any promises.

Q. Did you learn anything from this statement that you didn't already know?

A. I don't understand the question.

Q. Was there anything in this statement that there wasn't in the police report?

A. Yes.

Q. What was that?

A. You stated to me that you needed money for your lawyer, that you had a murder charge pending in St. Louis County."

Mistrial was immediately requested. In chambers, the witness, under oath, stated that when the word "statement"

was used, he understood it to mean the oral statement given before the video-taped confession. The officer did not know the oral statement had been suppressed.[4]

The trial court offered to instruct the jury to disregard the officer's answer and the prosecution offered to stipulate that defendant had been acquitted of the murder charge. Both of these offers were refused. We find no error.

It was stated in *State* v. *Stenner*, 591 S.W.2d 123 (Mo.App. 1979) l.c. 125:

> "This constitutional safeguard [inadmissibility of a failure to make statement] (and others involving the admissibility of evidence as firmly fixed in legal principles) is subject to the exception that the constitutional burden of inadmissibility is waived where no objection is made to the evidence *or such evidence is introduced or injected into the trial by the defense.* The factual background of each case as to the trial circumstances and evidence complained of is necessarily varied and only rarely similar, and each case must be separately evaluated against the foregoing principle and the recognized exceptions where waiver of the constitutional fault appears." (Emphasis Supplied).

Here the officer was unaware that the oral statement had been suppressed. The State did not question him about it. In response to defendant's initial questions, the officer differentiated between the term "video tape" and "statement" and treated them as two different things. Defendant utilized the term "statement" in his question which term the officer had previously made clear he utilized to refer to the oral statement, not the video tape. The

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[4]The oral statement was suppressed shortly before the officer took the stand. The officer was not in the courtroom at the time of the order suppressing the statement.

officer's answer was responsive to the question posed by defendant. The matter complained of was injected into the case by defendant and he is in no position to complain of the testimony. The trial court held the testimony to be invited and denied the mistrial. Defendant refused any other relief.

[13] Defendant's final point, raised by pro se brief, is that the armed criminal action conviction cannot stand in view of *Sours* v. *State*, 593 S.W.2d 208 (Mo. banc 1980) (Sours I). The Supreme Court has reaffirmed its conclusion that a conviction of armed criminal action and the underlying felony constitutes a violation of the rule against double jeopardy. *Sours* v. *State*, 603 S.W.2d 592 (Sours II) (Mo. banc 1980). The conviction for armed criminal action must be reversed.

Judgment of conviction for armed criminal action reversed; judgment of conviction of robbery first degree and of kidnapping affirmed.

SATZ and SIMON, JJ., concur.

STATE of Missouri, Respondent,

v.

Donnie L. COLLINS, Appellant.
No. WD 30966.

Missouri Court of Appeals,
Western District.

Oct. 1, 1980.

Motion for Rehearing and/or Transfer to Supreme Court Denied Nov. 3, 1980.

Application to Transfer Denied Dec. 15, 1980.

Defendant was convicted before the Circuit Court, Jackson County, James A. Moore, J., of first-degree robbery and armed criminal action, and he appealed. The Court of Appeals, Kennedy, P. J., held that: (1) alleged suggestiveness of lineup could not have contributed to any in-court misidentification of defendant by witness, since witness had talked with defendant face-to-face for at least ten minutes in outside daylight, it was only two hours until witness saw defendant at police station where he identified him, and witness stated that he recognized defendant by his facial features and also by scratches on his neck; therefore, trial court properly denied defendant's motion to suppress witness' in-court identification of defendant; (2) any error arising out of police officer's testimony implying that codefendant told the officer that defendant was the other robber was harmless, since codefendant was called by the State and testified that defendant and he had perpetrated the robbery with which defendant was charged; and (3) defendant's armed criminal action conviction upon proof of same facts as first-degree robbery conviction constituted double jeopardy in violation of defendant's constitutional rights, and the armed criminal conviction would therefore be reversed.

Affirmed in part and reversed in part and remanded.

1. Criminal Law 339.10(7)

Alleged suggestiveness of lineup could not have contributed to any in-court misidentification of defendant by witness, since witness had talked with defendant face-to-face for at least ten minutes in outside daylight, it was only two hours until witness saw defendant at police station where he identified him, and witness stated that he recognized defendant by his facial features and also by scratches on his neck; therefore, trial court properly denied defend-

ant's motion to suppress witness' in-court identification of defendant.

2. Criminal Law 1169.2(2)

In prosecution for robbery and armed criminal action, any error arising out of police officer's testimony implying that codefendant told the officer that defendant was the other robber was harmless, since codefendant was called by the State and testified that defendant and he had perpetrated the robbery with which defendant was charged.

3. Criminal Law 200(2)

Defendant's armed criminal action conviction upon proof of same facts as first-degree robbery conviction constituted double jeopardy in violation of defendant's constitutional rights, and the armed criminal conviction would therefore be reversed. V.A.M.S. §§ 559.225, 560.120, 560.135 (Repealed).

Clifford A. Cohen, Deborah L. Steelman, Kevin Locke, Gary L. Gardner, Kansas City, for appellant.

John Ashcroft, Atty. Gen., and Lew A. Kollias, Asst. Atty. Gen., Jefferson City, for respondent.

Before KENNEDY, P. J., and PRITCHARD and SWOFFORD, JJ.

KENNEDY, Presiding Judge.

Defendant Donnie L. Collins was convicted after a jury trial of the crimes of first-degree robbery and armed criminal action, in the armed robbery of one Payton Adams, III, at the Shannon Oil Company service station in Kansas City, Missouri, on September 23, 1978. He was sentenced to ten years' imprisonment on each count to be served concurrently.

The appeal raises two evidentiary points. We affirm

the judgment of first-degree robbery. For reasons hereafter noted, we reverse the armed criminal action judgment of conviction.

The first point raised by appellant is the overruling by the court of his pre-trial motion to suppress the in-court identification of defendant by one Roy Rodriguez.

Rodriguez was a fellow employee with Adams at the service station. Driving by the station shortly before 5 o'clock the afternoon of the robbery he saw a man—later found to be Ronald Johnson, an accomplice of the defendant in the robbery—pumping gas at the station. It didn't "look right", so he drove his truck into the station. The defendant emerged from the station and walked to Rodriguez's truck. He told Rodriguez, in answer to his question, that the gas attendant had to leave on an emergency, and had been replaced by Thelma, another employee, and Bob Morlock, the owner of the station. Defendant said that Tommy Lee Beaver, brother to Thelma, had left him in charge. He then ordered Rodriguez out of the truck and, as Rodriguez testified, "told me he was going inside and talk about it". By this time Ronnie Johnson, the man whom Rodriguez had first observed pumping gas, had come to the truck. Rodriguez produced a pistol and ordered both men to put their hands on the truck. Johnson did so, but defendant Collins did not. "He kept trying to make a play for his back", Rodriguez said, "so we stood there and talked about, anywhere from 10 to 15 minutes". Rodriguez saw a handgun stuck in the middle of defendant's back as he turned, and he took the gun from the defendant. Defendant then ran. The time was shortly after 5 o'clock p.m.

At this point Adams, tied hand and foot, came hopping out of the service station. The police arrived within five minutes. Rodriguez turned over to the police his prisoner, Ronald Johnson, and the gun which he had taken from defendant Collins.

About two hours later Rodriguez went to the police station to observe a lineup. Defendant Collins had been arrested and was in the lineup. Rodriguez immediately identified him.

[1] Defendant's first point is that the lineup was impermissibly suggestive, and the in-court identification should therefore have been quashed. Defendant claims the other two subjects in the lineup were markedly different from him in appearance. Defendant was five feet nine inches tall and was twenty-four years of age. One of the other men in the lineup was twenty-five years of age and was six feet one inch tall, while the third subject was five feet two inches tall, heavy set, and was seventeen years of age.

The lineup could not have contributed to any misidentification by the witness Rodriguez. The witness Rodriguez had talked with the defendant face to face for at least ten minutes in outside daylight. There can be no doubt that all his senses were alert during the conversation. It was only two hours until he saw the defendant at the police station where he identified him. He stated that he recognized the defendant by his facial features and also by scratches on his neck. The witness had a sound, independent basis for identification and the trial court was entirely correct in overruling the defendant's motion to suppress Rodriguez' in-court identification of the defendant, and in allowing Rodriguez to testify to defendant's identity as one of the persons who perpetrated the crime. *Manson* v. *Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); *Neil* v. *Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); *State* v. *Terry*, 582 S.W.2d 337 (Mo.App. 1979).

[2] Defendant's second point is that the court erred in allowing Police Officer Lawrence E. Sherrard to testify as follows:

Q. Upon your arrival did you find that there was a

Ronald Johnson there (at the Shannon Oil Company) under arrest?

A. Yes, I did.

Q. After you talked to Mr. Johnson, where did you respond?

A. I responded to 3528 South Benton.

Q. And whose address is that?

A. Donnie Collins.

Collins was found at the address and was arrested. Defendant argues that the plain implication of this testimony was that Johnson told Officer Sherrard that Defendant Collins was the other robber, and that such testimony is condemned by *State* v. *Kirkland*, 471 S.W.2d 191 (Mo. 1971), as hearsay.

In *Kirkland*, however, the speaker (corresponding to Johnson in the present case) was not called as a witness by the state. Her identification of the defendant to the police officer was vital to the identification of the defendant in that case. "As to this issue", the court said, "the truth of the matter asserted is of prime importance and defendant was entitled to cross-examine the person upon whose credit the matter was asserted as being the truth . . ." *Id.* at 194.

The important difference between the *Kirkland* case and the case now before us is that here the speaker did testify as a witness by the state. Johnson testified that the defendant Collins and he had perpetrated the robbery with which defendant Collins was charged. Furthermore, there was the positive identification by Payton Adams and by Roy Rodriguez. The identification of the defendant as the robber was thus fully established.

If the identification of defendant Collins as the other robber was inferred by the jury from Sherrard's testimony of his arrest of defendant after talking with Johnson, and if it was therefore inadmissible hearsay, it was merely cumulative and was harmless. *State* v. *McMillan,* 593 S.W.2d 629, 633, 634 (Mo.App. 1980).

[3] We *sua sponte,* under the plain error rule, Supreme Court Rule 29.12(b), *State* v. *Williams,* 595 S.W.2d 378, 379 (Mo.App. 1980), take note that defendant was convicted of first-degree robbery under §§ 560.120 and 560.135, RSMo 1969,[1] and of armed criminal action under § 559.225, RSMo Supp. 1976. For the two offenses he received separate sentences of ten years, to be served concurrently. During the pendency of this appeal it has become settled in Missouri that the armed criminal action conviction upon proof of the same facts as the first-degree robbery conviction constitutes double jeopardy in violation of defendant's constitutional rights. *Sours* v. *State,* 603 S.W.2d 592 (Mo. banc 1980); *Sours* v. *State,* 593 S.W.2d 208 (Mo. banc 1980).

The latter decision is retroactive in its effect and it renders void the armed criminal conviction in the present case. *Robinson* v. *Neil,* 409 U.S. 505, 93 S.Ct. 531, 34 L.Ed.2d 483 (1973); *Burrow* v. *White,* Order and Writ of Habeas Corpus, filed May 1, 1980 (Mo. banc).

The armed criminal action conviction is therefore reversed, and the case is remanded to the trial court to vacate and set aside that conviction, judgment and sentence.

The first-degree robbery conviction and judgment are affirmed.

All concur.

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[1]The information charged that the robbery was accomplished "with a dangerous and deadly weapon, to wit: automatic pistol, loaded with gunpowder and leaden balls . . ."

William BROWN, Movant-Appellant

v.

STATE of Missouri, Respondent.
No. WD 31499.

Missouri Court of Appeals,
Western Dist.

Oct. 1, 1980.

As Modified on Court's own Motion.

Motion for Rehearing and/or Transfer to Supreme Court Denied Nov. 3, 1980.

Application to Transfer Denied
Dec. 15, 1980.

Proceeding was instituted on a motion to vacate sentences imposed following a plea of guilty. The Circuit Court, Jackson County, Timothy D. O'Leary, J., granted partial relief by vacating sentence imposed and resentencing movant to terms originally agreed upon after a plea bargain, and movant appealed. The Court of Appeals, Turnage, P. J., held that: (1) movant, who did not receive sentence agreed upon because he admittedly violated one of the conditions of the bargain, was not entitled to withdraw his plea of guilty for involuntariness because based on a bargain containing a sentence he did not receive, and trial court erred in vacating sentence actually imposed on ground that conditions attached to bond rather than to plea agreement, and (2) conviction on count charging armed criminal action arose out of offense which formed basis for conviction on count charging robbery in the first degree and, as such, constituted double jeopardy requiring vacation of judgment and sentence on armed criminal action count.

Reversed and remanded with directions.

1. Criminal Law 274(3)

Where conditions imposed on movant were not part of bond under which he was released pending sentencing, but were part and parcel of plea bargain itself, and movant, his counsel, and prosecutor all understood and agreed under plea bargain that if movant abided by three conditions therein, sentence agreed upon would be imposed, and bargain was accepted by court, movant, who did not receive sentence agreed upon as he admittedly violated one of those conditions, was not entitled to withdraw his plea for involuntariness because based on a plea bargain containing a sentence he did not receive, and trial court erred in vacating sentence on ground that conditions attached to bond rather than plea agreement. V.A.M.R. Crim. Rule 27.26.

2. Criminal Law 200(2)

Conviction for armed criminal action arising out of offense which was basis of conviction for robbery in the first degree constituted double jeopardy and required a vacation of judgment and sentence with respect to armed criminal action.

Stanley L. Morris, Kansas City, for movant-appellant.

John Ashcroft, Atty. Gen., Philip M. Koppe, Asst. Atty. Gen., Kansas City, for respondent.

Before TURNAGE, P. J., and SHANGLER and MANford, JJ.

TURNAGE, Presiding Judge.

William Brown filed a motion under Rule 27.26 to vacate sentences imposed following a plea of guilty. The trial court granted partial relief by vacating the sentence imposed, and resentenced Brown to the terms originally agreed upon after a plea bargain.

Brown appeals and contends the court erred in failing to vacate the sentence entirely because he was entitled to withdraw his guilty plea when the plea bargain was not honored by the court. Reversed.

William Brown entered a plea of guilty to robbery in the first degree and to armed criminal action. During that plea Brown was interrogated both by his counsel and by the court to demonstrate that the plea was voluntarily and intelligently made. No complaint is made on this appeal that the plea was not in fact voluntarily, intelligently and knowingly made. During that hearing Brown freely admitted a robbery by use of a knife. Brown's attorney brought out from Brown that a plea bargain had been entered into by which he was to receive a sentence of eight years on the armed robbery count and four years on the armed criminal action count with the sentences to run consecutively. The plea bargain was based upon the agreement that Brown would observe three conditions while he was free on bond pending sentencing. These were that he would commit no criminal offenses, that he would not contact the State's witness and that he would appear on the day set for sentencing. Thereafter, Brown's counsel asked:

Q. So, you understand that if you don't abide by those three conditions, then the Judge is not committed to anything; he can give you two life sentences if he wants to, you understand that?

A. Yes.

Thereafter, on cross-examination by the prosecutor, Brown acknowledged that he accepted the conditions and that he realized if he violated any of the conditions he could possibly get two consecutive life sentences. Later, the court asked the following questions with the responses by Brown:

Q. If you commit any one of those three conditions,

then my commitment is off and I can give you anything I want to, up to two consecutive life sentences. You understand that?

A. Yes.

Q. Now you're pleading guilty for two reasons. One, you did commit the robbery, using the robbery, using a knife, like you're charged with, didn't you?

A. Yes.

Q. And you are also pleading guilty because you know what I'm going to do to you?

A. Yes.

Q. And that includes the conditions that I have attached—

A. Yes.

Q. —which we have just talked about, do you understand that—don't you? It's all part of the same package. I've made a commitment to you as long as you keep your commitment to me; that is, that you show up, you don't commit any more criminal offenses and you don't contact Beverly A. Hwange. Okay?

A. Yes.

Q. Is there anything about any one of those three conditions that you feel that you cannot abide by?

A. No, sir.

Q. Any difficulty, at all, about abiding by any one of those three commitments?

Q. All right. Now, you know what will happen if you violate any one of the three don't you?

A. Yes.

Q. I'll use my own discretion at that time as to what the sentence will be and I'm not [sic] released from my commitment as far as I'm concerned and if you have any difficulty with accepting that, I want you to tell me right now before I accept your plea of guilty.

A. No, sir, I don't have any difficulties.

Q. You're willing to accept that, so that sentencing will be deferred until December 27, 1978 so you can spend the next, approximately four weeks with your family, right?

A. Yes.

Brown appeared on December 27 as directed, but by agreement the sentencing was continued until January 5, 1979. Brown did not appear on January 5 and the court issued a warrant. Brown was later arrested under the warrant and appeared on March 30, 1979. At that hearing Brown acknowledged that he knew when sentencing was continued from December 27 to January 5 that the conditions he was to abide by continued in full force. Brown further acknowledged that he did not appear on January 5 and stated he had taken his family to Milwaukee because of some threats he had received. At that time the court stated:

> Now, my agreement with you, I think we went over it pretty good. My agreement with you was that if you appeared when you were supposed to, that you did not commit any other crime in the interim, or that you did not contact the State's witness, Beverly Wang (phonetic); that I would give you the sentence that I mentioned but if you did any one of those three things that I was released from my commitment and I could do anything I wanted to do, within the statutory limit,

by law, which Robbery I is five to life and Armed Criminal Action is, what three to life?

MR. ROGERS: (Brown's counsel) That's right, your Honor.

THE COURT: Am I correct on that?

DEFENDANT BROWN: Yes.

THE COURT: And you did not appear, did you?

DEFENDANT BROWN: No, sir.

The court continued sentencing until April 2, and at that time imposed a sentence of ten years on the robbery first degree count, and six years on the armed criminal action count, with the sentences to run consecutively.

In August, 1979, Brown filed the present motion under Rule 27.26. Counsel was appointed and a change of judge was taken from the judge who pronounced sentence. An evidentiary hearing was held and the court found that the three conditions imposed upon Brown's conduct while he was free on bond in the interim between the plea and sentencing were in reality conditions relating to his bond. The court held that Brown was entitled to the sentence agreed upon in the plea bargain, vacated the sentence imposed, and resentenced Brown in accordance with the original agreement.

Brown has appealed and now contends that under *Schellert* v. *State*, 569 S.W.2d 735 (Mo. banc 1978) he is entitled to withdraw his plea of guilty because the trial court did not sentence him in accordance with the plea bargain. On this appeal Brown argues that his plea was not voluntary because it was based on a plea bargain and since he did not receive the sentence agreed upon, his plea should now be held to be involuntary and he should be allowed to withdraw that plea.

There is no doubt that under *Schellert* any plea bargain entered into between the State and the defendant must be made known to the judge on the record and if the judge is not willing to abide by the terms of the bargain he must allow the defendant an opportunity to withdraw his plea. However, that situation is not present in this case. Here it is clear the conditions imposed upon Brown were not part of the bond under which Brown was released pending the sentencing. Rather, it is clear the conditions of Brown's conduct were part and parcel of the plea bargain itself. It is abundantly clear that Brown, his counsel and the prosecutor, all understood and agreed the plea bargain to be that if Brown abided by the three conditions, then the sentence agreed upon would be imposed. It is likewise abundantly clear that all parties, including Brown, knew and acknowledged that if Brown violated any of the three conditions the bargain was off and sentence would be in the discretion of the court. The bargain was accepted by the court.[1] Thus, this is not a situation in which the trial judge refused to abide by a plea bargain. Rather, the situation here is one in which the court accepted the bargain and agreed to abide by its terms. The only violation of the bargain was by Brown when he admittedly violated one of the conditions of the bargain. Therefore, the question becomes whether or not Brown has a right as a matter of law to withdraw his plea when he violated one of the conditions of the plea bargain.

When the State desires to take advantage of the violation of a condition imposed upon a defendant in a plea bargain, it must prove by a preponderance of the evidence that the defendant has violated his part of the bargain.

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[1]Brown does not contend the court impermissibly participated in the plea bargain. The record shows the bargain was presented to the court after it was made and the court's questions to Brown were to insure that Brown understood the bargain.

State v. *Curry*, 49 Ohio App.2d 180, 359 N.E.2d 1379, 1381 [1, 2] (1976). For this purpose the court must hold a hearing and the defendant has the right to call witnesses and to cross examine witnesses. *State* v. *Warren*, 124 Ariz. 396, 604 P.2d 660, 665[2-7] (App. 1979). However, those rules do not apply in this case because Brown freely admitted that he did not appear for sentencing and that he knew the conditions remained in full force when the hearing was continued from December 27 to January 5. No question is raised on this appeal concerning the violation by Brown of that condition.

Brown's assertion that he is entitled to withdraw his plea completely overlooks the fact that under the plea bargain he undertook the obligation to abide by the three conditions and later violated one of them. As stated in *In Re Troglin*, 51 Cal.App.3d 434, 124 Cal.Rptr. 234, 237[3, 4] (1975):

> Well established is the rule that the People will be held strictly to the terms of a plea bargain made with a criminally accused. . . . It seems reasonable and just, at least where no public policy, or statutory or decisional or constitutional principle otherwise directs, that the accused also be held to his agreement.

Here it is only reasonable and just to hold Brown to the bargain he made with the court and the prosecutor. That bargain was that if Brown violated any of the conditions the court was free to sentence him to any term allowed by law. The court carried out the bargain actually made and Brown is in no position to complain. Indeed to allow him to prevail would be to hold that he could profit by his violation of the agreement and in effect obtain a reward for his own wrongdoing.

[1, 2] The court is considering this motion was in error when it held the conditions attached to the bond

rather than the plea agreement itself. For that reason, the court erred in vacating the sentence actually imposed. The judgment on Brown's 27.26 motion is reversed and this cause is remanded with directions to enter a judgment denying Brown's motion as to the judgment and sentence for robbery in the first degree. A conviction for armed criminal action arising out of a robbery has been held to constitute double jeopardy in *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc 1980).

The court is directed to enter judgment vacating the judgment and sentence in the armed criminal action count. *State* v. *Leonard*, 606 S.W.2d 403 (Mo.App. 1980).

All concur.

STATE of Missouri, Respondent,

v.

Jackie MARTIN, Appellant.
No. WD 31116.

Missouri Court of Appeals,
Western District.

Oct. 1, 1980.

As Motion On Court's Own Motion.

Motions for Rehearing and/or Transfer to Supreme Court No. 3, 1980.

Application to Transfer Denied
Dec. 15, 1980.

Defendant was convicted in the Circuit Court of Jackson County, Division No. 11, Donald L. Mason, J., of robbery, first degree, and armed criminal action, and he appealed. The Court of Appeals, Manford, J., held that: (1)

the conviction for armed criminal action in addition to the conviction for armed robbery placed defendant in double jeopardy, in that the facts necessary to prove conviction for one offense also constituted the necessary facts to prove the second offense, and thus trial court erred in its failure to dismiss the armed criminal action count of the information, and (2) there was no plain error in the admission of a pistol allegedly used by defendant in commission of the crime even though there was equivocal identification of the pistol by witnesses, in that testimony of the witnesses relating to the pistol was a matter of the weight and sufficiency of such evidence and not its admissibility.

Reversed in part, affirmed in part.

1. Criminal Law 200(2)

Conviction of defendant for armed criminal action and for armed robbery, first degree, placed defendant in double jeopardy, in that facts necessary to prove conviction for one offense also constituted necesary facts to prove second offense, and thus trial court erred in its failure to dismiss armed criminal action count of the information. V.A.M.S. § 559.225, subd. 1 (Repealed); U.S.C.A. Const. Amend 5.

2. Criminal Law 404(4)

Any weapon or object not connected with crime for which accused stands charged is inadmissible unless such weapons or objects have some probative value, but determination of proper admission turns upon whether or not there is evidence to connect weapon or object with crime or with accused.

3. Criminal Law 404(4)

Identification of demonstrative evidence must be connected with a crime or accused, but that identification need not be absolute, positive, certain or entirely unqualified when related to question of admissibility.

4. Criminal Law 1036.4

In prosecution for robbery, first degree, there was no plain error in admission of pistol allegedly used by defendant in commission of crime, in that even though witnesses gave equivocal identification of pistol, testimony of witnesses relating to pistol was a matter of the weight and sufficiency of such evidence and not its admissibility.

Clifford A. Cohen, Public Defender, Gary L. Gardner, Asst. Public Defender, Kansas City, for appellant.

John Ashcroft, Atty. Gen., Jefferson City, Philip M. Koppe, Asst. Atty. Gen., Kansas City, for respondent.

Before TURNAGE, P. J., and SHANGLER and MANFORD, JJ.

MANFORD, Judge.

This is a direct appeal from a jury conviction for robbery, first degree, and the second offense of armed criminal action. The jury assessed punishment of nine years for the robbery conviction and seven years for the armed criminal action. Pursuant to § 546.430, RSMo 1978, the trial court reduced the sentences to seven years and five years respectively, said terms to run consecutively. The judgment is reversed in part and affirmed in part.

Two points are presented on this appeal. Appellant first alleges the trial court erred in its failure to dismiss Count II of the information, which alleged armed criminal action, because that count placed appellant in double jeopardy. As his second point of error, appellant charges the trial court committed plain error by admitting into evidence a black .38 caliber revolver, because the revolver was irrelevant to the offense charged and its admission was prejudicial.

On January 6, 1978, at approximately 3:30 p.m., ap-

pellant was observed by two employees of the Avis-Rent-a-Car offices in downtown Kansas City, Missouri. Appellant was observed looking up and down the street. He then entered the office and asked to rent a car. When appellant was asked for his driver's license, he produced a gun, demanded money and a car. Upon this demand, an employee handed appellant $266.00 and the keys to a rental automobile. At this point, a third employee entered the office, requesting assistance from his fellow employees to load a lawnmower into a motor vehicle. This third employee passed through the office, apparently unaware of the robbery in progress. This third employee then reentered the office and during his reentry, appellant passed this employee while making his escape.

The three employees then observed appellant enter a black Oldsmobile. Appellant departed that vehicle and then entered a black Monte Carlo. As appellant drove the Monte Carlo away, he was also observed by the three employees.

The police were alerted. The following day, appellant was observed driving the stolen vehicle and after a high-speed vehicular chase and a brief foot-chase, appellant was apprehended by the police.

Following his trial, conviction and the overruling of his timely filed motion for new trial, appellant lodged this appeal. At this juncture, appellant's first point is taken up and sustained. This court is bound to follow the last controlling decision of our State Supreme Court on any issue, see *State* v. *Wood*, 531 S.W.2d 543 (Mo.App. 1975) and Mo. Const. Art. V, § 2.

[1] In his point one, appellant alleges that conviction for armed criminal action, pursuant to § 559.225(1), RSMo Supp. 1976, and in addition to conviction for armed robbery, first degree, places an accused in double jeopardy. It would serve no purpose to reiterate herein the debate which has

ensued over this issue, and it suffices to state that upon a split decision, our State Supreme Court has decided the question on the basis that conviction for armed robbery and armed criminal action constitutes double jeopardy when the facts necessary to prove conviction for one offense also constitute the necessary facts to prove the second offense. An exhaustive analysis of the subject is to be found in and the reader is referred to *Sours* v. *State,* 593 S.W.2d 208 (Mo. banc 1980) (decision vacated by order of the United States Supreme Court on May 27, 1980 and reconsideration ordered) and the most recent decision, *Sours* v. *State* (No. 61458, handed down by the Missouri Supreme Court [en banc] on August 18, 1980), reinstating the original decision. Pursuant to the August 18, 1980 decision of *Sours* v. *State, supra,* point one raised by appellant is sustained.

Appellant's remaining alleged error charges the trial court with the commission of plain error in the admission of a black .38 caliber revolver because said revolver was irrelevant to the proof of the charge against appellant, and any probative value such evidence might have had was outweighed by its inherent prejudicial effect upon appellant's right to a fair trial.

Appellant invokes review for plain error. Such review could also be made upon the court's own motion pursuant to Rule 29.12(b) to determine any manifest injustice or miscarriage of justice.

In support of his second alleged error, appellant cites three cases for this court's consideration. These authorities are found to be distinguishable from and not controlling of the instant case. The first authority, *State* v. *Williams,* 543 S.W.2d 563 (Mo.App. 1976) involved a conviction for carrying a concealed weapon and the court reversed and remanded the lower court's decision, holding that the introduction of a second weapon found in an automobile in

which the accused was a passenger was irrelevant to a conviction for carrying a concealed weapon, and that repeated reference to the second weapon was prejudicial error. *State* v. *Charles,* 572 S.W2.d 193 (Mo.App. 1978) involved a reversal for second degree murder and robbery where repeated questioning of the accused about the weapon he carried at a prior time (a weapon actually in possession of the police at the time of the present offense) and repeated prosecutorial comments about the particular weapon were improper. *State* v. *Davis,* 530 S.W.2d 709 (Mo.App. 1975) involved a reversal upon admission of a sawed-off shotgun which was not found in the possession of the accused or his criminal associates or under circumstances that justified inference of likelihood or possibility of its having been available to defendant for use in robbery or otherwise connected with defendant.

In the instant case, appellant argues that the admission of a .38 caliber Smith & Wesson blue steel revolver was a plain error because the revolver was irrelevant to the proof of the offense charged. Appellant's argument is premised upon the testimony of the victims of the robbery.

Appellant contends that since two of the victims testified that they told the police the gun used in the robbery was silver in color, and that the gun recovered by the police was black, inherent prejudicial error was committed. If this court were to cease with such limited consideration of the evidence in the record of this case, appellant's argument might tend to acquire some semblance of merit. Reference to the entire evidence dispels appellant's contention however.

Two of the employees of the business that was robbed positively identified appellant as the robber. An additional employee witness observed appellant's flight from the scene of the crime. Regarding identification of the gun, the first witness testified:

"Q. (By Mr. Schaffer, prosecuting attorney) I'm going to hand you what has been marked State's Exhibit No. 5 and ask you if you can identify that?

A. It looks rather like the one that he had.

Q. Okay. When I hold it and it is empty. When I hold it in this position, is there anything different about it?

A. No.

Q. To the best of your knowledge, it is the same gun that he had in his possession that same day that he robbed you with?

A. To the best of my knowledge.

Q. Did he have anything on his hands while he was robbing you?

A. He was wearing gloves.

Q. By the way, I asked you to identify State's Exhibit No. 5 and you said it looks rather like the weapon that the defendant was carrying. Would you just for the record, would say what that object is?

A. State's Exhibit No. 5?

Q. Yes, what is it?

A. It's a gun."

That line of questioning was then followed by cross-examination of the witness as follows:

"Q. All right. Does this look like the gun?

A. Yes, it does.

Q. What color is this?

A. Well, it's black.

Q. Black?

A. Yes.

Q. Right?

A. Yes.

Q. That's the color you gave the police on the day of the robbery?

A. Well, I told them it was a silver color with the light shining on it. It does kind of look silver.

Q. I didn't ask you that. I asked you what did you tell the police on the day of the robbery?

A. That it was silver.

Q. Told them it was color, didn't you?

A. Not shiny.

Q. What color would you call silver? Is that silver enough for you?

A. Yes.

Q. You told them it was that color?

A. It's not shiny.

Q. Isn't silver usually shiny? That's black.

A. I have a silver car.

Q. Let me just ask you this, Mrs. S___. What color did you tell the police the gun was?

A. Silver.

Q. Are you saying today that the gun was black or silver?

A. The gun here is black and I told the police that it was silver.

Q. All right.

A. Silver and gray to me are the same color.

Q. Well, is this silver gun that you think that you saw on that day?

A. It looks very much like the gun that I saw that day.

Q. All right. But you do know this gun is not silver?

A. Yes.

Q. Now, all I'm geting at Mrs. S__ is on the day—Let's see, maybe it is. At any rate, you described the gun as a silver gun. Silver, gray and black all look the same or is it silver and gray?

A. Silver and gray.

Q. Is this color of gray you're talking about?

A. With the lights the way they were, it did look gray. It's brighter there and the sun shines in the office a lot more than in here.

Q. So, you think that may have been the gun?

A. Yes, I do."

The foregoing testimony was then followed by another employee's testimony on the same issue:

"Q. Now, you mentioned that as he came in and stood in front of that counter he pulled a revolver. I'll show you what has been marked as State's Exhibit No. 5 and ask you if you can identify this?

A. Yes, that's the weapon.

Q. You think it is?

A. I think it is.

Q. Does it appear to be the same weapon?

A. I think so.

Q. Okay. Is there anything different about it that you

can see today? Anything different about it and a weapon that appeared on January 6, 1978?

A. No, I don't think so."

and this second employee then testified upon cross-examination as follows:

"Q. All right. Have a seat. Now, isn't it true, you looked at the gun the robber had on that day, didn't you?

A. Yes.

Q. And isn't it true that you told the police that it was a chrome plated pistol?

A. Yes, I did.

Q. Is this a chrome plated pistol?

A. No.

Q. And this doesn't look like the pistol, does it?

A. It looks like a pistol, yes.

Q. It's not chrome plated.

A. No, but it still looks like a pistol.

Q. Here is what I'm saying. You described a pistol, you told the police, is this chrome plated?

A. Yes.

Q. Chrome plated is the color of a bumper?

A. It is.

Q. And you told the police the pistol was the color of a a [sic] chrome plated?

A. Yes.

Q. Is that true?

A. That's true.

Q. You see this pistol? Is this pistol chrome plated?

A. No, it's not.

Q. It's not chrome plated?

A. No.

Q. Do you want to rub to see if it's chrome plated underneath there? It's not chrome plated at all, is it?

A. No.

Q. How do you say that the pistol was the color of the pistol but the pistol you got is black but it looks like the pistol that they had on the day of the robbery?

A. It's still a pistol.

Q. It's still a pistol?

A. Yes.

Q. Even though it's not chrome plated?

A. That's right.

Q. The pistol you saw on the day of the robbery was chrome plated, is that right?

A. I don't know.

Q. So, you don't know what color the pistol was, do you?

A. No, I know it was a pistol, that I saw.

* * * * * *

Q. You have admitted that you were in error on your testimony on the pistol, haven't you?

A. That's possible."

The evidence continued with the testimony of the police officer who arrested appellant. The testimony relevant to the issue of the gun is as follows:

"Q. So, you were a police officer on January 7, 1978?

A. Yes, I was.

Q. Do you recall whether or not you were actually working on that day?

A. Yes, I was working.

* * * * * *

Q. Did you have occasion, now, directing your attention to around the hour of eleven o'clock in the morning on that date, did you have occasion to go to the vicinity of 12th and Garfield?

A. Yes.

Q. Why was it you went there?

A. To meet my captain, Captain Steven Neefer.

Q. What happened when you got there?

A. He showed me a black '77 Monte Carlo, Missouri license Y54193. Stated it was a stolen car taken in a robbery and asked me to set up a surveillance.

Q. What was that?

A. Y54193.

Q. Did you take any action in response to his order?

A. Yes, I set up a surveillance down the street about a block from th[illegible]ar.

* * * * * *

Q. Did anything happen with regard to that car before the day was over?

A. At approximately 12:50 hours a Negro male and Negro female got in the car and drove down the street toward us.

* * * * * *

Q. What did they do once they had entered the car?

A. They drove it in the direction I was sitting.

Q. What happened next?

A. They drove right by us and we pulled in behind them and proceeded on down 13th Street to Prospect. They went south on Prospect to the freeway entrance. We followed them on to the freeway. At 27th Street he evidently noticed we were behind him because he speeded up and we put the red light on.

* * * * * *

Q. Now, referring back to—did you tell the jury the persons in the car, this '77 Chevrolet Monte Carlo got off on 27th Street exit?

A. Yes, he did.

Q. What happened next?

A. He got off on the 27th Street exit and sped up to, attempting to elude us. We have a portable red light we keep in the car and I put it up on top of the car and we had our siren and he proceeded on westbound 27th Street at a high rate of speed.

* * * * * *

Q. What happened, did you follow them?

A. Yes, we pursued him west bound on 27th Street to Askew at which time he made a right turn and went northbound on Askew approaching 26th

Street. As he approached 26th Street he attempted to make a left—but he lost control of the car and slid into a house. He bailed out of the car and jumped over the fence. I bailed out of the police car and ran right after him. We went over two fences and he started to go through a yard of another house and there was another officer coming down the other street and he turned back at which time when he turned back he reached into his side to pull what I believed to be a revolver, at which time I drew my weapon and he pitched the weapon in the bushes and he was subdued and arrested at that time.

Q. Did you at any time loose [sic] sight of the '77 black Monte Carlo with the aforementioned license plates?

A. No, sir.

Q. Did you at any time after that car had crashed and that person bailed out and began to run, did you at any time loose [sic] sight of that person.

A. No, I did not.

Q. Did you actually see that person toss the gun somewhere?

A. Yes, I did.

Q. And where was it that he tossed it?

A. He tossed it in some bushes right beside where he was standing.

Q. Were you the officer who actually made the arrest?

A. I was one of the officers.

Q. Who was the person who had been driving the car and pitched the gun and ran?

A. The gentleman at the table there in the blue suit.

Q. Do you know his name?

A. I do now. Jackie Martin.

* * * * * *

A. After we wrestled him to the ground I reached over and picked up the gun and put it in my waistband and transported him to the station.

Q. When you reached over and picked the gun up, was the gun in the same area you had seen him throw it?

A. Yes, it was.

Q. I'm handing you what has been marked State's Exhibit No. 5. Can you identify that, please?

A. It's a .38 Smith and Wesson blue steel revolver, appears to be the one I found at the scene there that day."

Then, on cross-examination, the officer testified:

"Q. State's Exhibit No. 5, Officer, you identified as blue steel .38 cliber [sic] Smith and Wesson, is that correct?

A. Yes, I did.

Q. That's the gun that you saw Jackie Martin throw into the bushes?

A. Yes, sir.

Q. Not a chrome plated one?

A. No, sir.

Q. Not a nickel plated one?

A. No, sir."

Appellant's argument is premised upon the testimony of the state's witnesses that identification of the gun in question was only "similar" to the one used in the robbery and, from that, appellant contends it was plain error for the gun to have been admitted into evidence.

[2] To be sure, the general rule regarding any weapon or object not connected with a crime for which the accused stands charged is inadmissible unless such weapons or objects have some probative value, see *State* v. *Duncan,* 540 S.W.2d 130 (Mo.App. 1976); *State* v. *Johnson,* 539 S.W.2d 493 (Mo.App. 1976), cert. denied 430 U.S. 934, 97 S.Ct. 1558, 51 L.Ed.2d 779 (1977); but the determination of the proper admission turns upon whether or not there is evidence to connect the weapon or object with the crime or with the accused, see *State* v. *Duncan, supra; State* v. *Threat,* 530 S.W.2d 41 (Mo.App. 1975) and *State* v. *Thompson,* 559 S.W.2d 34 (Mo.App. 1977).

[3] Identification of demonstrative evidence must be connected with a crime or the accused, but that identification need not be absolute, positive, certain or entirely unqualified when related to the question of admissibility, see *State* v. *Chambers,* 550 S.W.2d 846 (Mo.App. 1977); *State* v. *Lawson,* 585 S.W.2d 247 (Mo.App. 1979); *State* v. *McAllister,* 534 S.W.2d 611 (Mo.App. 1976); *State* v. *Threat, supra; State* v. *Holman,* 556 S.W.2d 499 (Mo.App. 1977) and *State* v. *Kern,* 447 S.W.2d 571 (Mo. 1969).

[4] The equivocal identification of the gun in the instant case went to the weight of such evidence, and that determination was for the trier of fact. This question has been summarized as follows and finds direct application in the instant case:

> "The identification of an item at trial need not be entirely unqualified, as the weight to be given to identity is for the jury . . . [citations omitted] . . . Testimony

concerning an exhibit that it 'looks like', 'looks familiar', 'very much like', 'very similar', etc., to an involved object, has been held sufficient to warrant its admission into evidence." *State* v. *Ridinger,* 589 S.W.2d 110, 113 (Mo.App. 1979).

The testimony in the instant case brings this case within the rule of *State* v. *Ridinger, supra.*

In addition, it should be pointed out that at the time of his arrest, appellant had been driving the stolen Monte Carlo and just prior to his being physically subdued, he threw a .38 caliber handgun into some bushes in the immediate area of his arrest. There is authority for the admission of such evidence under a general precept that "a weapon found in the possession of an accused, or of his criminal associates, even if not identified as the weapon actually used in the commission of the crime, is admissible if similar in form and character to the one used," quoted in *State* v. *Benson,* 574 S.W.2d 440, 442 (Mo.App. 1978), citing also *State* v. *Cuckovich,* 485 S.W.2d 16 (Mo. banc 1972). *State* v. *Benson, supra,* also stands for the rule that identification of a weapon need not be wholly unqualified to make it admissible.

In the instant case, the testimony of the witnesses relating to state's exhibit no. 5, the .38 caliber revolver, is a matter of the weight and sufficiency of such evidence and not its admissibility. Such weight and sufficiency falls within the purview of the triers of fact.

There was no plain error in the admission of state's exhibit no. 5. By its admission, no manifest injustice or miscarriage of justice occurred. Under the facts and circumstances of the instant case as well as pursuant to authorities cited herein, point two presented by appellant is ruled against him.

For the reasons set forth herein, that portion of the

judgment related to the conviction for armed criminal action is herein reversed.

For the reasons set forth herein, that portion of the judgment related to the conviction for armed robbery, first degree, is in all respect affirmed.

All concur.

STATE of Missouri, Respondent,

v.

Rollan Anthony WILLIAMS, Appellant.
No. 61595.

Supreme Court of Missouri,
Division No. 1.

Oct. 15, 1980.

Rehearing Denied Nov. 12, 1980.

Defendant was convicted in the Circuit Court, St. Louis County, Philip Sweeney, J., on two counts of robbery in the first degree and two counts of armed criminal action, and he appealed. The Supreme Court, Robert R. Welborn, C., held that: (1) trial court, which promptly sustained defendant's objection and instructed jury to disregard testimony did not abuse its discretion in denying motion for mistrial, which was grounded on erroneous admission of police officer's testimony that a woman picked defendant out of a lineup, and (2) defendant, who was offered a lighter sentence prior to trial in return for a plea of guilty, failed to demonstrate that trial court's sentence was retaliatory for defendant's exercise of his right to trial by jury.

Affirmed in part and reversed in part.

Donnelly, J., filed concurring opinion.

Rendlen, P. J., concurred in the result.

1. Jury 135

Request to permit amendment of peremptory strikes before a jury is sworn is addressed to trial court's discretion.

2. Jury 135

Defendant failed to show prejudice or an abuse of discretion with regard to trial court's refusal to allow his attorney to amend his peremptory challenges after he had advised court that he had incorrectly transcribed the strikes from his list to those given to the bailiff.

3. Criminal Law 867

Trial court, which promptly sustained defendant's objection and instructed jury to disregard testimony, did not abuse its discretion in denying motion for mistrial, which was grounded on erroneous admission of police officer's testimony that a woman picked defendant out of a lineup.

4. Criminal Law 986.2(6)

Defendant, who was offered a lighter sentence prior to trial in return for a plea of guilty, failed to demonstrate that trial court's sentence was retaliatory for defendant's exercise of his right to trial by jury.

Michael J. Gorla, Clayton, for appellant.

Lew A. Kollias, Asst. Atty. Gen., Jefferson City, for respondent.

ROBERT R. WELBORN, Commissioner.

A jury in the St. Louis County Circuit Court found Rollan Anthony Williams guilty on two counts of robbery in the first degree and two counts of armed criminal action.

The court, acting under the Second Offender Act, sentenced the defendant to life imprisonment on each of the four counts, the sentences to run concurrently. This appeal followed.

The state's evidence showed that, on April 28, 1978, at around 6:45 p.m., Williams entered Hartwig's Tavern in Creve Coeur, St. Louis County, took a seat at the bar and was served a bottle of Budweiser beer. A short time later a second person entered the tavern and requested and was served a glass of water at the bar. Williams ordered a second beer and after he had been at the bar for about 15 minutes, he and the man to whom the water had been served pulled pistols and announced a holdup to the bar manager and other customers. Money belonging to the tavern owner was taken and the billfolds of at least two customers.

On May 18, 1978, Williams was arrested for the robbery and identified at a line-up by the bar manager. The bar manager identified Williams at his trial. Fingerprint technicians found Williams's palm print on one of the beer bottles from which he drank at the tavern.

Williams was charged with robbery in the first degree. One count was directed at the taking of the tavern money, the second at the taking of a customer's wallet and money. A charge of armed crminal action was filed to each of the two robbery counts.

Williams offered two witnesses who testified to an alibi. The jury found the defendant guilty of each of the four counts.

In this Court, appellant complains of the trial court's refusal to allow his attorney to amend his peremptory challenges after he advised the court that he had incorrectly transcribed the strikes from his list to the list given to the

bailiff. Appellant complains that the court's ruling denied appellant his statutory right to exercise of his peremptory challenges.

Appellant's brief states that the error involved came to his attention when Venireman McKenna was instructed by the bailiff to take seat No. 2 in the jury box. The brief states that appellant had intended to strike McKenna and that his attorney immediately notified the court of his mistake. However, the transcript which must be the basis for this Court's review shows that 12 jurors and one alternate were seated and that defense counsel thereafter advised the court of his error, that he had intended to strike McKenna and "* * * that because of the error on my part I didn't write it down on my list and consequently I strike an extra person." He requested leave of court to amend his strike to remove McKenna and to take off one of the strikes he had given the bailiff. The court overruled the request.

[1] A request to permit amendment of peremptory strikes before a jury is sworn is addressed to the trial court's discretion. *State* v. *Brown,* 554 S.W.2d 574, 578[7] (Mo.App. 1977); *State* v. *Blankenship,* 536 S.W.2d 520, 521-522[7] (Mo.App. 1976); *State* v. *Harris,* 356 S.W.2d 889, 890-891[2] (Mo. 1962).

[2] Appellant has shown no abuse of discretion in this situation. Although the record indicates that the jurors not selected had not been excused, contrary to the situation in *Harris,* the trial court's ruling is not for that reason an abuse of discretion. In view of the timing of the request as shown by the transcript, the trial court might well have felt that a change at that juncture would have presented problems. Appellant's complaint is that the trial court's action denied him the right to make his peremptory challenges as he saw fit. However, he acknowledges that he

can demonstrate no prejudice as a result of the court's ruling. He acknowledges that there was no basis for a challenge for cause against McKenna and relies upon a feeling, based on voir dire, that McKenna would not be a favorable juror. Appellant's cases involving the seating of a juror who should have been disqualified for cause are not in point.

No abuse of discretion and no prejudice having been demonstrated, this claim of error is rejected.

[3] Appellant complains of the trial court's denial of his request for a mistrial because a police officer testified that a woman (presumably the tavern manager) picked appellant out of a line-up. Objection to the testimony was promptly sustained and the jury instructed to disregard it but the request for a mistrial was denied. Appellant contends that *State* v. *Degraffenried,* 477 S.W.2d 57 (Mo. 1972), and *State* v. *Johnson,* 538 S.W.2d 73 (Mo.App. 1976), required a mistrial because of this testimony.

Johnson applied the *Degraffenried* test for determining the prejudicial effect of the erroneous admission of testimony. The question here is whether *Degraffenried* required a declaration of a mistrial because the testimony had been heard by the jury.

Degraffenried is distinguishable because the objection was overruled to the police officer's testimony regarding a state's eyewitness's line-up identification of the defendant. Although under *Degraffenried* the fact that the eyewitness herself had previously testified to her line-up identification of the defendant would not necessarily have rendered the officer's testimony harmless error had it been allowed to stand, over objection, the trial court could properly take that fact into consideration in determining the corrective measure called for. Given the drastic nature of the remedy of a mistrial, *Degraffenried* does not require

a mistrial on every case where such testimony slips into a trial. A proper exercise of discretion is still allowed insofar as declaring a mistrial is concerned and the trial court here did not abuse its discretion. See *State* v. *Brown*, 528 S.W.2d 503, 506[7] (Mo.App. 1975); *State* v. *Washington*, 549 S.W.2d 547-549[3] (Mo.App. 1977).

[4] Appellant contends that he was unconstitutionally penalized for exercising his right to a jury trial in that the court, on the state's recommendation, imposed four life sentences, whereas the state, prior to trial, had offered a sentence of four 15-year terms in return for a plea of guilty. Appellant relies upon *People* v. *Dennis*, 28 Ill.App.3d 74, 328 N.E.2d 135 (1975), as closely paralleling his case. In *Dennis*, in pretrial plea bargaining, participated in by the court with full knowledge of the defendant's past record and the state's pending case, the court had stated its willingness to accept the state's recommendation of a two to six-year sentence in return for a guilty plea. The defendant rejected that offer and when found guilty on a jury trial, the court, following the state's recommendation, imposed a 40 to 80-year sentence. Upon post-conviction review, the court upheld the defendant's contention that the heavier sentence had been imposed for the defendant's exercise of his right to jury trial. The court noted the absence of anything in the record to justify the heavy sentence imposed.

The distinguishing feature between that case and this is the judge's participation in the plea bargaining in *Dennis*. In this case, the trial judge was not a party to the plea bargaining. The fact that his sentences coincided with the state's recommendation does not charge him with responsibility for or approval of the pre-trial offer. *Dennis* recognizes the distinction between this situation and that presented in *Dennis* and notes that "* * * a mere disparity between the sentence offered during plea bargaining and

that ultimately imposed, of itself, * *'' does not provide a basis for relief. 328 N.E.2d 138[5].

Appellant has not demonstrated that the trial court's sentence was retaliatory for the defendant's exercise of his right to trial by jury. *State* v. *Volner*, 569 S.W.2d 781 (Mo.App. 1978).

Under *Sours* v. *State*, 593 S.W.2d 208 (Mo. banc 1980); vacated, *Missouri* v. *Sours*, 446 U.S. 962, 100 S.Ct. 2935, 64 L.Ed.2d 820 (1980); on remand, *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc 1980), the convictions for armed criminal action cannot stand.

Judgment affirmed as to counts I and III; reversed as to Counts II and IV.

MORGAN, J., concurs.

DONNELLY, J., concurs in separate concurring opinion filed.

RENDLEN, P. J., concurs in result.

DONNELLY, Judge, concurring.

Few would contend that the position of the United States Supreme Court, reference the National Double Jeopardy Clause, is presently coherent. *See* Westen and Drubel, *Toward a General Theory of Double Jeopardy; 1978 The Supreme Court Review* 81 (Chicago: The Univ. of Chicago Press, 1979).

In this circumstance, the attempt of the majority in *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc 1980) to follow the twists and turns of the United States Supreme Court in this area of the law is almost masochistic. In *North Carolina* v. *Butler*, 441 U.S. 369, 376, 99 S.Ct. 1755, 1759, 60 L.Ed.2d 286 (1979) the Court stated that it will "accept whatever construction of a state constitution is placed upon it by the highest court of the State."

First, I would disentangle and hold:

(1) That Mo.Const. art. I, § 19 proscribes a second prosecution for the same offense after acquittal.

(2) That to cause a person to be twice prosecuted for the same offense after conviction is to deprive that person of due process of law. Mo.Const. art. I, § 10.

(3) That to cause a person to be twice punished for the same offense is to deprive that person of due process of law. Mo.Const. art. I, § 10.

Second, I would implement (1) and (2), *supra,* by applying Mr. Justice Brennan's "same transaction" test and require "the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson,* 397 U.S. 436, 453, 454, 90 S.Ct. 1189, 1199, 25 L.Ed.2d 469 (1970). (Brennan, J., concurring). *See also* ALI, Model Penal Code, Proposed Official Draft §§ 1.07, 1.08, 1.09 (1962).

Third, I would implement (3), *supra,* by proscribing punishment in excess of what the Missouri General Assembly intended.

I concur under the compulsion of *Sours, supra.*

STATE of Missouri, Respondent,

v.

Tommy Bryant KENDRICK, Appellant.
No. 61936.

Supreme Court of Missouri,
Division No. II.

Oct. 15, 1980.

Rehearing Denied Nov. 12, 1980.

The Circuit Court, Jasper County, Herbert C. Casteel, J., convicted defendant of armed robbery and armed criminal action, convicted defendant pursuant to guilty plea of three counts of robbery, and convicted defendant of three additional counts of armed criminal action, and defendant appealed. The Supreme Court, Alden A. Stockard, C., held that defendant could not be convicted of both robbery in the first degree by means of dangerous and deadly weapon, and armed criminal action based on use of dangerous instrument or deadly weapon in commission of robbery.

Affirmed in part and reversed in part.

1. Criminal Law 1178

Where there is no point in defendant's appellate brief pertaining to judgment entered on certain count, appeal as to that count was abandoned.

2. Criminal Law 29

Where defendant was convicted of robbery in the first degree by means of dangerous and deadly weapon, he could not also be convicted on counts of armed criminal action based on use of dangerous instrument or deadly weapon in commission of the charged robberies.

David Robards, Public Defender, Joplin, for appellant.

John Ashcroft, Atty. Gen., Steven W. Garrett, Asst. Atty. Gen., Jefferson City, for respondent.

ALDEN A. STOCKARD, Commissioner.

Appellant was charged by indictment with four counts of robbery in the first degree by means of a dangerous and deadly weapon, and with four counts of armed criminal action, each based on the use of a dangerous instrument or deadly weapon in the commission of one of the charged robberies. Trial before a jury was had on Count V (armed rob-

bery) and Count VI (armed criminal action), and after a finding of guilty as to each count, appellant was sentenced to imprisonment for thirty years for robbery and to life imprisonment for armed criminal action, the sentences to be served concurrently. Thereafter, appellant entered a plea of guilty to each of the remaining three counts of robbery, and was sentenced to imprisonment for thirty years on each count to be served concurrently. As to the remaining three counts of armed criminal action, appellant waived jury trial, entered into a stipulation of facts pertaining to each, and was found guilty by the trial court and sentenced to concurrent life imprisonment on each count.

[1] The notice of appeal was from the judgment entered on Count V (robbery in the first degree), and on Counts II, IV, VI and VIII, each based on armed criminal action). However, there is no point in appellant's brief pertaining to the judgment entered on Count V, and the appeal as to that count is abandoned. *State* v. *Sykes*, 436 S.W.2d 32 (Mo. 1969); *State* v. *Reese*, 364 Mo. 1221, 274 S.W.2d 304 (banc 1954).

[2] Appellant's challenge to the judgment entered on the counts charging the offense of armed criminal action must be sustained. *Sours* v. *State*, 593 S.W.2d 208 (Mo. banc 1980); vacated, *Missouri* v. *Sours*, ____ U.S. ____, 100 S.Ct. 2935, 64 L.Ed.2d 820 (1980); on remand, *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc 1980).

The judgment of conviction on Count V for robbery in the first degree is affirmed. The judgment on conviction on Counts II, IV, VI and VIII (each based on armed criminal action) is reversed.

PER CURIAM:

The foregoing opinion by STOCKARD, C., is adopted as the opinion of the Court.

All of the Judges concur.

STATE of Missouri, Respondent,

v.

Donald GREER, Appellant.
No. 61548.

Supreme Court of Missouri,
Division 2.

Sept. 9, 1980.

Rehearings Denied Oct. 15, 1980.

Defendant was convicted in the Circuit Court, Jackson County, Gene R. Martin, J., of murder in second degree and armed criminal action, and defendant appealed. The Supreme Court adopted opinion of Alden A. Stockard, C., holding that: (1) failure to transcribe grand jury proceedings pertaining to charges did not violate any statute, rule, or constitutional mandate; (2) indictment-information procedure did not define class to which one or other alternate procedures was applicable to exclusion of other, did not purport to operate to disadvantage of some "suspect class" or infringe upon fundamental right protected by Constitution, and did not deny defendant equal protection of laws; and (3) conviction for offense out of occurrence which constituted murder in second degree was invalid.

Affirmed in part; reversed in part and sentence vacated.

1. Grand Jury 40

Proceedings before grand jury do not have to be recorded in every case. V.A.M.S. §§ 56.190, 540.105.

2. Grand Jury 40

Failure to transcribe grand jury proceedings pertaining to charges of murder in second degree and armed crim-

inal action did not violate any statute, rule, or constitutional mandate. V.A.M.S. §§ 56.190, 540.105; U.S.C.A.Const. Amend. 14.

3. Grand Jury 40

Indictment—information procedure entitling murder defendant, if he had been charged by information, to preliminary hearing and to transcript of hearing, while, if defendant was charged by indictment, leaving obligation to record grand jury proceedings discretionary, did not violate any of defendant's rights under Missouri Constitution because Constitution was source of procedure. V.A.M.S. Const. Art. 1, § 17.

4. Grand Jury 25

Purposes of grand jury are to inquire into commission of crimes, to return indictments when it determines that crime has been committed and that there is probable cause to believe that it was committed by indicted person, to insure against arbitrary prosecution and to protect citizens against unfounded accusations.

5. Grand Jury 35, 41

Generally, proceedings of grand jury are secret except as specifically modified by statute, and accused has no absolute right to appear before grand jury or to have his counsel present.

6. Constitutional Law 211(1)

Purpose of equal protection clause of Fourteenth Amendment is to prohibit class legislation which discriminates against some citizens and favors others. U.S.C.A. Const. Amend. 14.

7. Constitutional Law 211(3)

Inequality arising from permissible discretion in administration of law does not result in violation of equal

protection of law clause of Federal Constitution. U.S.C.A. Const. Amend. 14.

8. Grand Jury 40

Indictment information procedure which, if defendant had been charged by information, required that defendant be provided with preliminary hearing and transcript of such hearing, but, if defendant had been charged by indictment, left decision of whether grand jury proceeding were recorded discretionary, did not purport to operate to disadvantage of some "suspect class" or infringe upon fundamental right protected by Constitution. U.S.C.A.Const. Amend. 14.

9. Indictment and Information 4

An accused has no constitutional right to be charged with crime only by information.

10. Constitutional Law 250.2(1)

Indictment information procedure under which, if defendant had been charged by information, he would have been entitled to preliminary hearing and transcript of hearing, but, where defendant was charged by indictment, whether grand jury proceedings were recorded was discretionary, did not define class to which one or other alternate procedures was applicable to exclusion of other and therefore did not deny murder defendant equal protection of law when he was indicated by grand jury whose proceeding was not recorded. U.S.C.A.Const. Amend. 14.

11. Constitutional Law 211(3)

Without purposeful classification in enforcement procedure or administration of law, there can be no denial of equal protection of laws. U.S.C.A.Const. Amend. 14.

12. Constitutional Law 250.1(3)

Fact that prosecutor can exercise some discretion as to

whether to proceed by information or present evidence to grand jury for its consideration does not result in violation of equal protection clause. U.S.C.A.Const. Amend. 14.

13. Constitutional Law 250.2(1)

Law pertaining to grand jury proceedings applied equally to all who were indicted by grand jury, and fact that murder defendant was charged by grand jury instead of by way of information did not result in denial of equal protection of law under either Missouri or Federal Constitution. V.A.M.S.Const. Art. 1, § 17; U.S.C.A.Const. Amend. 14.

14. Criminal Law 29

Where defendant, convicted of murder in second degree, was also convicted of offense of armed criminal action which arose out of occurrence which constituted murder in second degree, conviction for offense of armed criminal action was invalid.

Philip H. Schwarz, Kansas City, for appellant.

John Ashcroft, Atty. Gen., Paul Spinden, Asst. Atty. Gen., Jefferson City, for respondent.

ALDEN A. STOCKARD, Commissioner.

Appellant, Donald R. Greer, was charged by indictment in two counts with murder in the second degree and armed criminal action. He was found guilty by a jury which fixed the punishment at life imprisonment for each offense. The trial court imposed sentences pursuant to the jury verdict and directed that the two sentences run concurrently.

Appellant does not challenge the sufficiency of the evidence as to either count, and we need not relate in detail the facts. It is sufficient to state that a jury reasonably

could find from the evidence offered by the State that on February 6, 1978 appellant shot and killed Calvin Sandridge.

By his first point appellant asserts that it was error for the trial court to permit the trial to proceed over his objection when there was no record made of the proceedings of the grand jury which indicted him. It is admitted that in this case there was no record made of the proceedings before the grand jury pertaining to appellant, and that it is the practice in Jackson County not to make a record of grand jury proceedings. Appellant further asserts that he was thereby denied due process and equal protection of law. He points out if he had been charged by information with having committed a homicide a preliminary hearing would have been required at which the evidence given by the several witnesses would have been reduced to writing, § 544.370 RSMo 1978, and would have been available to him to be used at trial to cross-examine those witnesses who testified at the preliminary hearing. § 544.390 RSMo 1978.

[1] In some states by court rule, *McMahon* v. *Office of City and County of Honolulu,* 51 Haw. 568, 465 P.2d 549 (1970); *People* v. *Duncan,* 388 Mich. 489, 201 N.W.2d 629 (1972), or by statute, *Seim* v. *State,* 95 Nev. 89, 590 P.2d 1152 (1979), the recording of testimony before a grand jury is mandated. However, there is no requirement in this State that the proceedings before a grand jury must be recorded in every case. *State ex rel. Dunlap* v. *Hanna,* 561 S.W.2d 411 (Mo.App. 1978); *State* v. *Shives,* 601 S.W.2d 22 (Mo.App. 1980). Section 540.105 RSMo 1978, gives to the circuit court the discretion to direct that the testimony before a grand jury in a particular case be transcribed, and § 56.190 RSMo 1978, gives the same discretion to the prosecuting attorney in counties of Class One. Appellant does not attempt to demonstrate that because of the nature of this case the failure to direct that the testimony

be transcribed constituted an abuse of discretion. As stated in *State* v. *Delgado*, 161 Conn. 536, 290 A.2d 338 (1971), it is the general practice in most states not to require a stenographic record of grand jury proceedings, and it is not required under the Federal Rules of Criminal Procedure. *United States* v. *Caruso*, 358 F.2d 184 (2nd Cir. 1966). See *United States* v. *Schrenzel*, 462 F.2d 765 (8th Cir. 1972) in which it was held that there is no constitutional requirement that a grand jury record its proceedings. See also *United States* v. *Biondo*, 483 F.2d 635 (8th Cir. 1973) cert.den. 415 U.S. 947, 94 S.Ct. 1468, 39 L.Ed. 563.

[2] The failure to transcribe the grand jury proceedings pertaining to the charges against appellant did not violate any statute, rule, or constitutional mandate.

In support of his contention that he was denied equal protection of law appellant asserts that if he had been charged by information he would have been entitled to have counsel present at the preliminary hearing to determine probable cause, and that a transcript of the hearing would have been made which would have been available to him for use at his trial. He contends that these rights were arbitrarily cut off when the prosecuting attorney initiated the prosecution by grand jury indictment.

[3] Mo.Const. Art. I, § 17 provides: "That no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies, * * *."

The indictment-information procedure does not violate any of appellant's rights under the Missouri Constitution because that is the source of the procedure. See also *Beeman* v. *State*, 502 S.W.2d 254 (Mo. 1973); *State* v. *Martin*, 395 S.W.2d 97 (Mo. 1965); and *State* v. *Cooper*, 344 S.W.2d 72 (Mo. 1961). Therefore, if there is merit to appellant's assertion that he was denied equal protection of law, it

must be by reason of the equal protection of law clause in the Fourteenth Amendment of the Constitution of the United States.

Missouri by its Constitution has provided two completely different and alternative methods of initiating a criminal proceeding. One method is by indictment returned by a grand jury. Prior to the adoption of the Constitution of 1875 no person could be prosecuted for an indictable offense except by an indictment returned by a grand jury. Art. XIII, § 14 Mo.Const. 1820. This was changed by Art. II, § 12, Const. 1875 to permit prosecution by information as well as by indictment.

[4, 5] The grand jury is of ancient origin, and, in general terms, its purpose is to inquire into the commission of crimes, and to return indictments when it determines that a crime has been committed and that there is probable cause to believe that it was committed by the indicted person. One of its purposes is to insure against arbitrary prosecution and to protect citizens against unfounded accusations, *Conway* v. *Quinn*, 168 S.W.2d 445 (Mo.App. 1942), or as stated in *Hoffman* v. *United States*, 341 U.S. 479, 71 S.Ct. 814, 817, 95 L.Ed. 1118 (1951), "to stand between the prosecutor and the accused." Generally, the proceedings of a grand jury are secret except as specifically modified by statute, *State* v. *McDonald*, 342 Mo. 998, 119 S.W.2d 286 (1938), and the accused has no absolute right to appear before the grand jury or to have his counsel present. *United States* v. *Smith*, 552 F.2d 257 (8th Cir. 1977).

The alternate method of initiating a criminal proceeding is by information. Any person having knowledge of the commission of a crime may make his affidavit and file it with the Clerk of the Court having jurisdiction of the offense, or he may deposit it with the prosecuting attorney, who in a reasonable exercise of discretion may determine

whether the complaint warrants prosecution. *State ex rel. Schultz* v. *Harper*, 573 S.W.2d 427 (Mo.App. 1978). A preliminary hearing before a judge is required which the accused is entitled to attend, introduce evidence in his behalf, and cross-examine witnesses against him. If from the evidence introduced at the preliminary hearing it appears to the judge that there is probable cause to believe that a felony has been committed and that the defendant has committed it, Rule 22.07(c), an information may be filed by the prosecuting attorney, and the proceedings thereafter are the same as when an indictment is returned by a grand jury. The purpose of the preliminary hearing is to prevent unreasonable or arbitrary prosecutions, and to have an independent judicial determination of the issue of probable cause.

The procedures are not intended to be identical, and the differences are based on the fundamental nature of the two independent methods of initiating a criminal proceeding.

[6-10] The purpose of the equal protection clause of the Fourteenth Amendment to the United States Constitution is to prohibit class legislation which discriminates against some citizens and favors others. But, the Missouri indictment information procedure does not define a class to which one or the other alternate procedures is applicable to the exclusion of the other. There is no class created which is favored under the law over another. Inequality arising from permissible discretion in the administration of a law does not result in a violation of the equal protection of law clause of the Federal Constitution. This issue was considered at length in *San Antonio Independent School District* v. *Rodriquez*, 411 U.S. 1, 17, 93 S.Ct. 1278, 36 L.Ed. 16 (1973). There a challenge was made to the Texas system of financing public education. The Supreme Court first stated that it was necessary to decide whether

the Texas system "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny." It was held that the system did not, and in the case now before us it is clear that the Missouri indictment-information procedure does not purport to operate to the disadvantage of some "suspect class" or infringe upon a fundamenal right protected by the Constitution. An accused has no constitutional right to be charged with a crime only by information. The United States Supreme Court then held that there was no evidence that the administration of the Texas system discriminated against any definable category of people, or that it resulted in absolute deprivation of education as to any definable group. In the pending case, there is no definable group that may be charged only by indictment or only by information.

[11, 12] The fact that a prosecutor can exercise some discretion as to whether to proceed by information or present evidence to a grand jury for its consideration does not result in a violation of the equal protection clause. We do not have before us the situation where the State has deliberately and intentionally resorted to the indictment procedure as to all persons of a certain race or some other definable class to the exclusion of others. Without a purposeful classification in the enforcement procedure or the administration of the law, there can be no denial of equal protection of the laws. For example, in Missouri and in most other states the prosecutor is vested with discretion whether to invoke the habitual criminal provisions. In *Oyler* v. *Boles*, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962), it was held that defendants' prosecution under the habitual criminal statutes of West Virginia did not violate the Federal equal protection of laws clause even though in the exercise of discretion the State had applied the law to only

a minority of those subject to its provisions. The Court stated: "[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." See *Taylor* v. *State,* 423 P.2d 473, 474 (Okla.Cr. 1976) in which it was held that "The Oklahoma habitual criminal statute applies equally and impartially to all persons charged under it, and the fact that indictments or informations do not always charge violation of such statute where accused has had prior felony convictions, does not invalidate [the] statute as denying equal protection of the laws." See also *State* v. *Sheppard,* 371 So.2d 1135 (La. 1979), where the grant of discretion to try a minor for manslaughter as an adult did not result in a denial of equal protection of the laws, and *People* v. *Lawrence,* 26 Ill. App.3d 685, 325 N.E.2d 363 (1975), where the exercise of discretion not to treat a 17-year old accused as a minor did not result in a violation of equal protection of the law.

Prior decisions in this State have not specifically addressed the issue presented here, but it was stated in *Beeman* v. *State,* supra at p. 255, that "The provision of Mo.Const.Art. I, § 17, V.A.M.S., authorizing persons to be prosecuted for felony by indictment *or information,* which specifically states that these are concurrent remedies, 'is not violative of the due process and equal protection of the laws clauses of the Federal Constitution, Amend. 14,' " citing *State* v. *Cooper,* 344 S.W.2d 72 (Mo. 1961); *State* v. *Jones,* 168 Mo. 398, 68 S.W. 566 (1902); *Lyle* v. *Eidson,* 182 F.2d 344, (8th Cir. 1950); and *Hurtado* v. *California,* 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884). In other jurisdictions the issue has been specifically presented in several cases, and in no case has it been ruled that a procedure comparable to that in this State violates the equal protection clause of the Federal Constitution. See *State Cousino,* 18 Ariz.App. 158, 500 P.2d 1146 (1972); *State* v. *Hinkle,* 26 Ariz.App. 561, 550 P.2d 115 (1979);

Burke v. *Superior Court in and for County of Pima*, 3 Ariz. App. 576, 416 P.2d 997 (1966); *State* v. *Kanistanaux*, 68 Wash.2d 652, 414 P.2d 784 (1966); *State* v. *Bojorquez*, 111 Ariz. 549, 535 P.2d 6 (1975); *People* v. *Franklin*, 80 Ill.App.3d 128, 35 Ill.Dec. 121, 398 N.E.2d 1071 (1980); *Seim* v. *State*, supra; *Gasaway* v. *Page*, 448 P.2d 284 (Okl. Cr. 1968); *Falgout* v. *People*, 170 Colo. 32, 459 P.2d 572 (1969); *Chung* v. *Ogata*, 53 Haw. 395, 495 P.2d 26 (1972); *Commonwealth* v. *Morris*, 267 Pa.Super. 379, 406 A.2d 1091 (1979); *State* v. *Mastrian*, 285 Minn. 51, 171 N.W.2d 695 (1969).

[13] The law pertaining to grand jury proceedings apply equally to all who are indicted by a grand jury, and the fact that appellant was charged by a grand jury instead of way of an information did not result in a denial of the equal protection of law under either the Missouri or Federal Constitution.

[14] Appellant also challenges the validity of his conviction of the offense of armed criminal action which admittedly arose out of the occurrence which constituted murder second degree. This contention must be sustained. *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc Aug. 18, 1980).

That part of the judgment pertaining to second degree murder is affirmed; that part pertaining to armed criminal action is reversed and the sentence vacated.

PER CURIAM:

The foregoing opinion by ALDEN A. STOCKARD, C., is adopted as the opinion of the court.

All of the Judges concur.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

REGINALD BULLOCK, *Petitioner,* vs. DONALD WYRICK, Warden, *Respondent.*	**No. 81-400C(2)**

ORDER

Upon consideration of the record and the Magistrate's Review and Recommendation,

IT IS HEREBY ORDERED that the Review and Recommendation of the Honorable William S. Bahn, United States Magistrate, be and is accepted.

IT IS FURTHER ORDERED that petitioner's petition for a writ of habeas corpus be and is denied and that this case be and is dismissed.

JOHN P. NAGLE
UNITED STATES DISTRICT JUDGE

Dated: July 29, 1981.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

REGINALD BULLOCK,
Petitioner,

v.

DONALD WYRICK, etc.,
Respondent.

No. 81-400C(2)

MAGISTRATE'S REVIEW AND RECOMMENDATION

Reginald Bullock has filed this petition seeking federal habeas, pursuant to 28 U.S.C. § 2254. The matter has been referred to the undersigned United States Magistrate, pursuant to 28 U.S.C. § 636(b).

Bullock went to trial on January 17, 1978. Shortly after the jury was impaneled, Bullock pleaded guilty to all counts of a three count indictment charging first degree robbery, armed criminal action and burglary and stealing. Immediately thereafter, the St. Louis County Circuit Court Judge sentenced Bullock to fifteen years on the robbery, ten years on the armed criminal action, ten years on the burglary and five years on the stealing. All terms of imprisonment were to run concurrently. Bullock then filed a Rule 27.26 motion to vacate sentence. The circuit court denied relief. The Missouri Court of Appeals affirmed in part, but also vacated his conviction and sentence for armed criminal action on the basis of *Sours* v. *State*, 603 S.W.2d 592 (Mo. banc 1980), *cert. denied sub. nom., Missouri* v. *Sours*, 101 S.Ct. 953 (1981). Bullock's motions for rehearing and trans-

fer were denied. *Bullock* v. *State*, 608 S.W.2d 480 (Mo.App. E.D. 1980). Bullock appears to raise here the same issues presented to the Missouri Court of Appeals. Therefore, petitioner has exhausted his available state remedies. Respondent does not dispute exhaustion.

The facts relating to the offense appear in the plea transcript and the indictment. On July 17, 1977, one Charles Dietrich found Bullock in his house. Bulock had several of Dietrich's firearms in his possession. Bullock then, using a knife, forced Dietrich into a bedroom. He bound Dietrich with a rope and removed a gold watch and currency from Dietrich's pocket.

As respondent correctly notes, Bullock's claims all revolve around his claim of double jeopardy. Therefore, the appropriate first step is to determine whether Bullock's conviction on this three count indictment violated rights secured by the Federal Double Jeopardy Clause. The proper first step is to examine the elements of said offenses.

The elements of first degree robbery as charged in the indictment and under § 569.020, RSMo (1969), requires the forcible stealing with intent to deprive, of the property of another, by threatened immediate use of a dangerous instrument. Stealing, as Bullock was charged, requires the taking and carrying away the property of another with the intent to deprive the owner of its use. Armed criminal action involves the commission of a felony by use of a dangerous instrument or deadly weapon. § 571.015, RSMo.

We note arguably, stealing and first degree robbery may involve the same elements except that first degree robbery has the additional element of threatened use of a dangerous weapon. Under the analysis of *Blockburger* v. *United States*, 284 U.S. 299 (1932), these two offenses could be the "same" offense for purposes of the Double Jeopardy Clause. The Missouri Court of Appeals, however,

found the offense of stealing was completed prior to the time the robbery occurred. We agree. The facts elicited during the guilty plea proceedings demonstrate Bullock had burglarized the victim's house and was in possession of the victim's firearms when he was discovered by Dietrich. Only then did he commit the robbery, taking currency and a gold watch from the victim, and threatening him with a knife. Under these circumstances, convicting Bullock of stealing and robbery did not violate his double jeopardy rights. *United States* v. *Eisenberg*, 469 F.2d 156 (8th Cir. 1972), cited by petitioner, supports this principle. There, the Eighth Circuit held the bombing of two buildings constituted two separate offenses.

Bullock contends his conviction for armed criminal action was a violation of the rights secured by the Double Jeopardy Clause. This Court notes that armed criminal action and any other underlying felony may be the "same" offense under *Blockburger* v. *United States, supra.* The standards enunciated by *Blockburger* are inapplicable to the offense of armed criminal action because the Missouri State Legislature has evinced the clear intent that punishment under the armed criminal action statute be in addition to punishment for the underlying felony. *See, Sours* v. *State, supra*, wherein the Missouri Supreme Court definitively interpreted the Missouri legislature's intent. The United States Supreme Court has recently held the Federal Double Jeopardy Clause does not bar multiple conviction and punishment where the legislature intends multiple and separate punishment. *Albernaz* v. *United States*, 101 S.Ct. 1137 (1981); *Whalen* v. *United States*, 445 U.S. 684 (1980); *Missouri* v. *Counselman*, 101 S.Ct. 1690 (1981); *Missouri* v. *Brown*, 101 S.Ct. 1735 (1981). This line of cases indicates if the legislature intended crimes to be punished multiply and separately, then no double jeopardy violation exists. Only if the legislative intent is uncertain is the *Block-*

burger test applied. Since the Missouri legislature intended punishment for armed criminal action to be in addition to punishment for the underlying felony, no double jeopardy violation exists.

We note in passing, petitioner asserts his conviction for burglary violates his double jeopardy rights, apparently because the burglary was part of the "same transaction". Respondent properly notes the "same transaction" test is not the standard for double jeopardy. *See, Asle* v. *Swenson*, 397 U.S. 436 (1970). The controlling principles are announced in *Albernaz* and *Blockburger*.

Bullock contends his plea was not voluntary, knowing and intelligent because the offense he was charged with constituted double jeopardy. Since we find no double jeopardy violation, this claim is without merit. Furthermore, the Court made an extensive record during the plea proceedings in accordance with *Boykin* v. *Alabama*, 395 U.S. 238 (1969). The factual basis for the plea was developed. Bullock was informed of his rights. The record as a whole shows the guilty plea was voluntarily and intelligently entered.

Petitioner contends counsel was ineffective for not informing him the indictment violated his double jeopardy rights. This is not so for the reasons stated above. Furthermore, we note this case was tried before *Sours* v. *State*, *supra*. Counsel cannot be deemed incompetent for relying on *State* v. *Treadway*, 558 S.W.2d 646 (Mo. banc 1977), which prevailed at that time.

Bullock's final two claims are that the court lacked jurisdiction and considered invalid convictions during sentencing because it considered charges and convictions obtained in violation of his double jeopardy rights. Again, we find no such violation.

We note the Missouri Court of Appeals vacated Bullock's armed criminal action conviction under the authority of *Sours I* and *Sours II*. That was an appropriate step under the then persuasive precedent. This Court, having the benefit of *Albernaz*, *Counselman*, and *Brown*, has the firm conviction no double jeopardy violation ever existed.

As a final point, Bullock asserts infirmities existed in his state Rule 27.26 proceedings. Respondent properly points out such infirmities, even if proven, are not the basis for federal habeas. *Noble* v. *Sigler*, 351 F.2d 673 (8th Cir. 1965).

Therefore, the undersigned United States Magistrate recommends this petition be dismissed without further proceedings.

The parties are hereby advised that they have ten days from the service of this recommendation with which to file objections to same, pursuant to 28 U.S.C. § 636(b).

WILLIAM S. DOBY
UNITED STATES MAGISTRATE

Dated: June 25, 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

VAN WOODS,
Petitioner,

vs.

DONALD WYRICK, Warden,
Respondent.

No. 79-498C(1)

ORDER

This matter is before the Court upon petitioner's motion for reconsideration. For the reasons stated below, petitioner's motion will be stayed.

On July 14, 1981, this Court denied petitioner's request for the issuance of a writ of habeas corpus. On July 14, 1981 the Missouri Supreme Court, en banc, issued a ruling which held that convictions for both armed criminal action and robbery in the first degree with a dangerous and deadly weapon, arising out of the same transaction, is a violation of the double jeopardy clause of the Fifth Amendment. *State of Missouri* v. *Robert Lee Haggard,* #62227, ___ S.W.2d ___ (July 14, 1981) (Mo. banc). Respondent opposes petitioner's motion for a rehearing, stating that the Missouri Supreme Court's ruling is contrary to the United States Supreme Court interpretation of federal constitutional guarantees.

Because the United States Supreme Court is the final arbiter of United States Constitutional guarantees, and after notification by affidavit of the Missouri Attorney

General's intention to seek a writ of certiorari from the United States Supreme Court,

IT IS HEREBY ORDERED that petitioner's motion for reconsideration be and is STAYED until final disposition of *State of Missouri* v. *Robert Lee Haggard*.

Dated this 23rd day of July, 1981.

H. Kenneth Wangelin
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

VAN WOODS,
Petitioner,

v.

DONALD WYRICK, Warden,
Respondent.

No. 79-498C(1)

ORDER

After careful consideration of the pleadings, motions, memoranda, exhibits of record, the opinion of the Eighth Circuit Court of Appeals, the review and recommendation of the United States Magistrate, and petitioner's objections thereto, and particularly in light of the Supreme Court's decision in *Albernaz* v. *United States*, 49 U.S.L.W. 4237 (March 9, 1981),

IT IS HEREBY ORDERED that Van Wood's petition for federal habeas relief pursuant to 28 U.S.C. § 2254 be denied.

H. Kenneth Wangelin
UNITED STATES DISTRICT JUDGE

Dated: July 14, 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

VAN WOODS,
Petitioner,

v.

DONALD WYRICK, Warden,
Respondent.

No. 79-498C(1)

ORDER

MAGISTRATE'S REVIEW AND RECOMMENDATION

Van Woods is back before this Court on remand from the United States Court of Appeals for the Eighth Circuit. We had previously denied Van Woods' federal habeas from concurrent sentences out of the State of Missouri for holdup and armed criminal action. The file is replete with the facts leading up to the federal habeas and we will not labor their repetition. At any rate, the District Court rejected Woods' claims of double jeopardy, relying on *State* v. *Treadway*, 558 S.W.2d 646 (Mo.St.Ct. 1977), *cert. denied*, 439 U.S. 838 (1978).

While this matter was pending in the Court of Appeals, the Missouri Supreme Court overruled *Treadway* in *Sours* v. *State*, No. 61458, filed January 15, 1980. The Supreme Court granted certiorari to the State of Missouri and remanded same to the courts in Missouri in light of *Whalen* v. *United States*, 445 U.S. 684 (1980). Upon remand, the Missouri Supreme Court reaffirmed its position that conviction of both armed criminal action

and robbery violated the double jeopardy clause of the Federal Constitution. *Sours* v. *State*, 603 S.W.2d 592 (Mo. 1980). The state's application for certiorari was denied.

On the heels of all of this analysis, the Supreme Court ruled in *Albernaz* v. *United States*, 49 U.S.L.W. 4237 (U.S. March 9, 1981), that punishments on separate counts of conspiracy to distribute marijuana and conspiracy to import marijuana could stand, even though both convictions were based upon the same facts.

We note that the United States Supreme Court, on March 23, 1981, vacated several judgments of the Court of Appeals of Missouri, Eastern District, and remanded same for further consideration in light of *Albernaz* in *Missouri* v. *Counselman, Jr.*, No. 80-754. In these remands which include *Counselman* and four others, the United States Supreme Court has misgivings about Missouri's application of the double jeopardy contentions, arising from dual convictions for robbery and armed criminal action.

In *Sours, supra*, the Missouri Supreme Court conceded that the Missouri legislature did intend to impose multiple punishments for armed criminal action and the underlying felony. If you take these conclusions and distill them through *Albernaz, supra*, *Whalen, supra*, and *Kowaski* v. *Parratt*, 533 F.2d 1071 (8th Cir. 1976), all of which cases indicate that where Congress intended to impose multiple punishments for convictions of separate crimes, even though perpetrated in one proceeding, then no double jeopardy violation occurs. To be grossly simplistic, we conclude that since robbery can be accomplished without a weapon, and therein, become a crime in itself, then to accompanying the robbery with the use of a weapon, you have satisfied the requirements of both the robbery and armed criminal action. Resultant prosecution could bring

about two distinct convictions, because the second conviction contains an element of proof, not required by the first and thereby becomes a separate and distinct crime. This dichotomous theory has been debated in numerous state and federal courts. All seem to agree that the lawmakers' intention, should be controlling in the analysis of separate and distinct crimes. The only obstacle to these interpretations would be the double jeopardy provisions of the Constitution, which only protect against repeat prosecution of the same crime.

In the Van Woods case, we think the facts support the two convictions and resultant consecutive sentences imposed. Therefore, it is our recommendation that his application for federal habeas corpus be dismissed without further proceedings.

The parties are hereby advised that they have ten days from the service of this recommendation within which to file objections to same, pursuant to 28 U.S.C. § 636(b).

WILLIAM S. DOBY
UNITED STATES MAGISTRATE

Date: June 12, 1981

Opposition

1

No. 81-625

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

Office - Supreme Court.
FILED
OCT 26 1981
ALEXANDER L. STEVAS
CLERK

STATE OF MISSOURI,
Petitioner,

v.

ROBERT LEE HAGGARD,
Respondent,

(and twenty-two cases also joined in this petition per Rule 19.4).

On Petition for Writ of Certiorari to the Supreme Court of Missouri.

RESPONDENT'S BRIEF IN OPPOSITION

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ATTORNEYS FOR RESPONDENT
ROBERT LEE HAGGARD

QUESTION PRESENTED

Does the Fifth Amendment's Double Jeopardy Clause prohibit the multiple punishment of a criminal defendant charged in a single prosecution with the offenses of First Degree Armed Robbery and Armed Criminal Action in violation of Missouri State Statutes.

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No. 81-625

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

STATE OF MISSOURI,
Petitioner,

v.

ROBERT LEE HAGGARD,
Respondent,

(and twenty-two cases also joined in this petition per Rule 19.4).

On Petition for Writ of Certiorari to the Supreme Court of Missouri.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Robert Lee Haggard requests this Court deny appellant's petition for writ of certiorati.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent Robert Lee Haggard suggests that to the cited statutory and constitutional authority cited by petitioner should be added the following:

Section 556.041(1), R.S.Mo. 1978, which reads as follows:

> Section 556.041. Limitations on conviction for multiple offenses. - When the same conduct of a person may establish the commission of more than one offense he may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if
>
> (1) One offense is included in the other, as defined in Section 556.046;

Section 556.046.1(1), R.S.Mo. 1978, which reads as follows:

> Section 556.046. Conviction of included offenses. - 1. A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when
>
> (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged;

REASONS FOR DENYING THE WRIT

1. The decision of the Missouri Supreme Court does not conflict with this Court's decisions and there is no precedent for the proposition which petitioner seeks to advance herein.

The petitioner has affirmatively stated in its brief that Albernaz v. United States, 450 U.S. ___, 101 S.Ct. 137, 67 L.Ed.2d 275 (1981) is controlling stare decisis for the issue presented in this case. However, this assertion ignores that the ultimate issue involved in any Double Jeopardy question is whether the two offenses for which the State is seeking conviction and sentence constitute the same offense.

This Court had specifically found in Albernaz, supra., that a conspiracy to import marijuana and conspiracy to distribute the marijuana each require proof of an element which the other did not and that they, therefore, did not constitute the same offense, thereby creating any need for the application of any prohibition of the Double Jeopardy Clause. To the contrary, however, the Missouri Supreme Court in en banc decision believed that the offenses with which respondent Haggard was bound for trial each required no separate element for proof and that multiple punishments were prohibited.

The petitioner has argued that the Court below seemed confused. No confusion is manifest in the Court's decision which held the case controlled by Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 305 (1952), by Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), and cases later decided by this Court as the precedential authority.

2. The question presented does not affect a large number of litigants because of recent decisions of the Missouri Supreme Court and because of recent statutory enactments.

Only the respondents in this case, twenty-three (23) in number, will be affected by this Court's ruling upon the merits of the question presented. All cases filed prior to January 1, 1979, by any prosecutor in the state are involved in this appeal according to respondent's best knowledge.

The Armed Criminal Action Statute §559.225 R.S.Mo. Supp. 1976, was enacted by the Missouri General Assembly to take effect in 1976. In 1978 §571.015 R.S.Mo. was enacted in lieu of the previous Armed Criminal Action Statute and §559.225 was repealed. The new enactment contained the same prohibition of conduct and prescribed a similar penalty.

The same year the new Armed Criminal Action Statute was enacted a new Criminal Code was adopted by Missouri. Thus, persons convicted in Missouri after January 1, 1979, are convicted under Missouri's new criminal code, which repealed the older criminal code in Missouri, including armed robbery, and if the offense also involves the use of a firearm, defendants are charged and convicted under §571.015 as mentioned.

The Missouri Supreme Court was faced with the question of whether a criminal defendant under the new statutory enactments could be multiply punished contemporaneously with this appeal in State ex rel. Westfall v. Ruddy, No. 61958 (Mo. banc, July 23, 1981). The Court, applying Blockburger, Supra., as a rule of statutory construction as is mandated by Albernaz ruled that the application of Sections 556.041 and 556.046 required the jury be instructed as a matter of Missouri law that defendants charged with the crime of Armed Criminal Action and the underlying felony could be convicted of only one of the charged offenses.

Consequently, even assuming the petitioner's suggested position is the correct interpretation of the law, only those persons included in this appeal will be affected by the Court's ruling and the question presented in this appeal has long been obviated by changes in applicable Missouri Statutes and case law.

CONCLUSION

In conclusion, the Missouri Supreme Court having correctly decided the issue, this Court is requested to deny the petition herein pending for writ of certiorari.

Respectfully submitted,

Robert S. Gardner
320 South Ohio
Sedalia, MO 65301
816-827-3020

Robert M. Liston
702 South Kentucky
Sedalia, MO 65301
816-827-3020

ATTORNEYS FOR DEFENDANT
ROBERT LEE HAGGARD

I hereby certify that one copy of the foregoing has been deposited in the United States Mail, first class, postage prepaid, on the _____ day of October, 1981, to Mr. Steven W. Garrett, Assistant Attorney General, Supreme Court Building, P. O. Box 899, Jefferson City, MO 65102.

Robert M. Listen

ORIGINAL

RECEIVED
OCT 26 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 81-625

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

STATE OF MISSOURI,
Petitioner,

v.

ROBERT LEE HAGGARD,
Respondent,

(and twenty-two cases also jointed in this petition per Rule 19.4).

On Petition for Writ of Certiorari to the Supreme Court of Missouri.

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

Comes now Robert Lee Haggard, respondent herein, by and through his attorney, and moves this Court for leave to file his Brief in Opposition without prepayment of costs, if any, and to proceed in forma pauperis herein pursuant to Rule 46.

Respectfully submitted,

Robert S. Gardner, #16237
320 South Ohio
P. O. Box 1344
Sedalia, MO 65301
Attorney of Record

Robert M. Liston

Robert M. Liston, #21681
702 South Kentucky
Sedalia, MO 65301
816-827-3020
Attorney to be notified

I hereby certify that one copy of the foregoing has been deposited in a United States mailbox, first class, postage prepaid, on this the 23rd day of October, 1981, to Mr. Steven W. Garrett, Assistant Attorney General, Supreme Court Building, P. O. Box 899, Jefferson City, MO 65102.

Robert M. Liston

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

STATE OF MISSOURI,
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ROBERT LEE HAGGARD,
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(and twenty-two cases also joined in this petition per Rule 19.4).

On Petition for Writ of Certiorari to the Supreme Court of Missouri.

AFFIDAVIT IN SUPPORT OF
MOTION TO PROCEED IN FORMA PAUPERIS

I, Robert Lee Haggard, being first duly sworn, depose and say that I am a respondent in the above-entitled case; that in support of my motion for leave to proceed in forma pauperis I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe the State of Missouri is not entitled to redress; and that I desire to oppose the issues raised by the State in its petition for writ of certiorari.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting the appeal are true.

1. Are you presently employed?

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

Answer:

I AM NOT PRESENTLY EMPLOYED.
MY LAST EMPLOYMENT WAS JAN 1978
$900.00 PER MONTH

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

Answer:

NO

3. Do you own any cash or checking or savings account?

a. If the answer is yes, state the total value of the items owned.

Answer:

NO

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

a. If the answer is yes, describe the property and state its approximate value.

Answer:

NO

5. List the persons who are dependant upon you for support and state your relationship to those persons.

Answer:

NONE

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

Robert Lee Haggard

ROBERT LEE HAGGARD

SUBSCRIBED AND SWORN TO before me this 20th day of October, 1981.

ROBERT A. FOREMAN
NOTARY PUBLIC STATE OF MISSOURI
MY COMMISSION EXPIRES AUGUST 1, 1984

Robert A. Foreman

NOTARY PUBLIC

I hereby certify that one copy of the foregoing has been deposited in a United States mailbox, first class postage prepaid, on this 23rd day of October, 1981, to Steven H. Garrett, Assistant Attorney General, Supreme Court Building, P. O. Box 899, Jefferson City, Missouri, 65102.

Robert M. Liston

ROBERT M. LISTON

Opposition

2

Office - Supreme Court, U.S.
FILED
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CLERK

No. 81-625

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

STATE OF MISSOURI,
Petitioner,

v.

ROBERT LEE HAGGARD,
Respondent,

(and twenty-two cases also joined in this petition per Rule 19.4)

On Petition for Writ of Certiorari to the Supreme Court of Missouri

RESPONDENT WILLIAM BROWN'S BRIEF IN OPPOSITION

SIMMONS, MORRIS & BUTCHER
STANLEY L. MORRIS

403 Plaza Center Building
800 West 47th Street
Kansas City, Missouri 64112
(816) 531-3100

Attorney for Respondent
William Brown

QUESTION PRESENTED

Whether the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution is violated by imposing multiple punishment in a single prosecution for both armed criminal action, §559.225, R.S.Mo. Supp. 1976, and its underlying felony, when each offense does not require proof of an element which the other does not.

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No. 81-625

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

STATE OF MISSOURI,
Petitioner,

v.

ROBERT LEE HAGGARD,
Respondent,

(and twenty-two cases also joined in this petition Per Rule 19.4)

On Petition for Writ of Certiorari to the Supreme Court of Missouri

RESPONDENT WILLIAM BROWN'S BRIEF IN OPPOSITION

Respondent William Brown respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Supreme Court of Missouri's opinion in these twenty-three cases.

REASONS FOR DENYING THE WRIT

1. The decision below does not conflict with decisions of this Court, because there is no decision of this Court which is stare decisis for the decision below.

Petitioner asks this Court to grant a writ of certiorari on the basis of an alleged conflict in a decision of the Missouri Supreme Court in State v. Haggard, 619 S.W.2d 44 (Mo. banc 1981) with this Court's opinion in Albernaz v. United States, 450 U.S. _____, 101 S.Ct. 1137, 67 L.Ed2d 275 (1981).

Haggard was convicted of first degree robbery, Sections 560.120, R.S.Mo. 1969 and 560.135, R.S.Mo. 1975 Supp., and armed criminal action 559.225 R.S.Mo. 1976 Supp., Haggard,

supra, at 45. The offenses of which he was convicted arose from a single factual setting and each offense did not require proof of an element which the other did not. Albernaz was convicted of conspiracy to import marijuana and of conspiracy to distribute marijuana. A single conspiracy occurred but the separate offenses of which Albernaz was convicted contained elements which required proof of a fact which the other did not. Simply, Haggard could not have been convicted of armed criminal action in the absence of proof of the comisision of a felony (here, first degree robbery) although Albernaz could have been convicted of either of the charges against him without requiring proof of both offsenses. The distinction is apparent and it is readily discernible that the decisions of this Court in Albernaz, supra, and of the Missouri Supreme Court in Haggard, supra, are not conflicting. The Missouri Supreme Court has not refused to be bound by a controlling decision of this Court.

The Missouri Supreme Court considered the issues presented in Haggard, supra, in Sours v. State, 593 S.W.2d 208 (Mo. banc, 1980), vacated and remanded sub nom. Missouri v. Sours, 446 U.S. 962, 100 S.Ct. 2935, 64 L.Ed.2d 820 (1980) and Sours v. State, 603 S.W.2d 592 (Mo. banc 1980). In each of the three cases cited, the test enunciated in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932) was applied:

> ". . . where the same act constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."

The Missouri Supreme Court has held in Haggard, supra and both the Sours cases, supra, that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution is violated by convicting and punishing an individual when a determination is made, under Blockburger, supra, that provisions of two offenses, arising from the same act, do not require proof of a fact which the other does not.

The various cases referred to above are consistent with the decisions of this Court, including Albernaz, supra.

Missouri's former armed criminal action statute, the focal point of the instant petition, Haggard, supra, and Sours (I and II), supra, has been repealed but readopted in practically identical language as Section 571.105 R.S.Mo. 1978. The statute is available at this time but the difficulty in the usage of the statute has been diminished. Missouri's Supreme Court, in State v. McCrary, 621 S.W.2d 266 (Mo. banc 1981) has stated at 269:

> "The General Assembly has codified the "Blockburger definition of lesser included offenses in Section 556.046.1(1), R.S.Mo. 1978, and has provided in Section 556.041, R.S.Mo. 1978, that a criminal defendant may not be convicted or more than one offense which arise out of the same conduct if the offenses are included within each other as defined in Section 556.046.1, R.S.Mo. 1978."

2. The question presented is not an important question of federal law which should be settled by this Court, because its resolution will affect only the twenty-three respondents in this case.

The petition for writ of certiorari does not involve a substantial federal question. The petition, if granted, will affect only those individuals whose cases have been consolidated for presentation to this Court. Those twenty-three individuals have been convicted of a felony and of armed criminal action pursuant to a 1976 Missouri statute that was repealed and replaced effective January 1, 1979. The matter, therefore, will not be a continuing problem and is not sufficient for the purpose of granting the writ sought by the petitioner.

CONCLUSION

Rspondent William Brown, all for the reasons stated above, respectfully requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

SIMMONS, MORRIS & HUTCHER, P.C.

By _____

Stanley L. Morris
403 Plaza Center Building
800 West 47th Street
Kansas City, Missouri 64112
(816) 531-3100

ATTORNEY FOR RESPONDENT
WILLIAM BROWN

I hereby certify that one copy of the foregoing has been deposited in the U.S. mail, first class, postage prepaid, this 18th day of December, 1981, to:

Steven W. Garrett
Assistant Attorney General
Supreme Court Building
P. O. Box 899
Jefferson City, Missouri 64102.

Philip M. Koppe
Assistant Attorney General
Missouri State Office
Building - Room G-20
615 East 13th Street
Kansas City, Missouri 6410(

_____

Stanley L. Morris, Attorney for
Respondent William Brown

No. 81-625

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF MISSOURI,
Petitioner,

v.

ROBERT LEE HAGGARD,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
DONALD L. COLLINS,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
STANLEY G. HELTON,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
RANDY LEE SINCLAIR,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
TIMOTHY CREWS,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
WILLIE TUNSTALL,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
TERRY GENE CREWS,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
ROBERT LOWERY,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
ROLLAN ANTHONY WILLIAMS,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
TOMMY BRYANT KENDRICK,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
JOHNNY WILLIAMS,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
WALLACE D. COUNSELMAN, JR.,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
BOBBY JOE McGEE,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
MICHAEL L. WHITE,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
MARLON PAYNE,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
DONALD GREER,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
WILLIAM BROWN,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
JACKIE MARTIN,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
EDDIE GREER,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
HAROLD HAWKINS,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
CARL FLETCHER,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
HANSFORD GASKIN,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
EDWARD H. PENNINGTON, JR.,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Missouri.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, William Brown, being first duly sworn, depose and say that I am a respondent in the above-entitled case; that in support of my motion for leave to proceed in forma pauperis, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe the State of Missouri is not entitled to redress; and that I desire to oppose the issues raised by the State in its petition for writ of certiorari.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you present employed?

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of salary and wages per month which you received.

Answer: No; 1978, $800.00 per month.

2. Have you received within the past twelve months, any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

Answer: No.

3. Do you own any cash or checking or savings account?

   a. If the answer is yes, state the total value of the items owned.

Answer: No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   a. If the answer is yes, describe the property and state its approximate value.

Answer: No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Answer: None

I understand that a false statement or answer to my questions in this affidavit will subject me to penalties for perjury.

William Brown
William Brown

Subscribed and sworn to before me this ___ day of OCT 07 1981, 1981.

OSCAR D. DUNBAR
Notary Public, State of Missouri
My Commission Expires August 1, 1984

Oscar D. Dunbar
Notary Public

My Commission Expires:

_____

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was mailed, postage prepaid, this 16th day of October, 1981, to:

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Sedalia, Missouri 65301

James Fletcher
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Attorneys for Respondent
William Brown

Opposition

3

No. 81-625

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

STATE OF MISSOURI,
Petitioner,

v.

ROBERT LEE HAGGARD,
Respondent,

(and twenty-two cases also joined in this petition per Rule 19.4).

On Petition for Writ of Certiorari to the Supreme Court of Missouri.

RESPONDENT'S BRIEF IN OPPOSITION

JAMES W. FLETCHER
Public Defender

GARY L. GARDNER
Assistant Public Defender

1305 Locust, Suite 202
Kansas City, Missouri 64106
816/474-5811

Attorneys for Respondents Donnie L. Collins, Eddie Greer, Harold Hawkins and Jackie Martin.

QUESTION PRESENTED

If this Court grants a writ of certiorari in this case, despite respondents Donnie L. Collins, Eddie Greer, Harold Hawkins and Jackie Martin's opposition thereto, then it should be granted to resolve only the following question presented.

Whether the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution is violated by imposing multiple punishment, which the legislature intended, in a single prosecution for both armed criminal action, §559.225, RSMo Supp. 1976, and its underlying felony, when each offense does not require proof of an element which the other does not.

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No. 81-625

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

STATE OF MISSOURI,
Petitioner,

v.

ROBERT LEE HAGGARD,
Respondent,

(and twenty-two cases also joined in this petition per Rule 19.4).

On Petition for Writ of Certiorari to the Supreme Court of Missouri.

RESPONDENT'S BRIEF IN OPPOSITION

Respondents Donnie L. Collins, Eddie Greer, Harold Hawkins, and Jackie Martin respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Supreme Court of Missouri's opinion in these twenty-three cases.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents Donnie L. Collins, Eddie Greer, Harold Hawkins and Jackie Martin add to the constitutional and statutory provisions involved, cited by petitioner at pages 12 and A-213 through A-218 of its petition, the following statutes.

Section 556.041(1), RSMo 1978, reads as follows:

> Section 556.041. Limitations on conviction for multiple offenses. -- When the same conduct of a person may establish the commission of more than one offense he may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if
>
> (1) One offense is included in the other, as defined in section 556.046;

Section 556.046.1(1), RSMo 1978, reads as follows:

> 556.046. Conviction of included offenses. --
> 1. A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when

(1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged;

REASONS FOR DENYING THE WRIT

1. The decision below does not conflict with decisions of this Court, because there is no decision of this Court which is stare decisis for the decision below.

Petitioner asserts as a reason for granting the writ that the decision below, State v. Haggard, No. 62227 (Mo. banc July 14, 1981), conflicts with decisions of this Court, particularly Albernaz v. United States, 450 U.S. ___, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). Petitioner asserts that the ultimate and penultimate sentences in Albernaz should have controlled the decision in Haggard.

There is no conflict between Albernaz and Haggard, because Albernaz is not stare decisis for Haggard and the ultimate and penultimate sentences in Albernaz are dicta, unnecessary for this Court's conclusion therein. In Albernaz, conspiracy to import marihuana and conspiracy to distribute marihuana each required proof of an element which the other did not. Albernaz, supra, 67 L.Ed.2d at 281. In Haggard, armed criminal action and first degree robbery each did not require proof of an element which the other did not. Haggard, supra, slip op., 3. In other words, the issues in Albernaz and Haggard were different. In Albernaz, the issue was does the Double Jeopardy Clause prohibit the imposition of multiple punishment, which the legislature intended, in a single prosecution for two offenses each of which required proof of an element which the other did not. In Haggard, the issue was the same, but for there being two offenses each of which did not require proof of an element which the other did not. Broad language, unnecessary to a decision of this Court, cannot be considered binding authority. Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212, 222-223 (1972). Thus, the Supreme Court of Missouri has not refused to be bound by a controlling decision of this Court, and it has not expanded the protection of the Double Jeopardy Clause, in violation

of Oregon v. Hass, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975), beyond that specifically rejected by this Court.

Petitioner asserts that the Supreme Court of Missouri failed to be bound by Albernaz, because it failed to recognize that the Blockburger test, Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306, 309 (1932), is solely "a rule of statutory construction" which "because it serves as a means of discerning congressional purpose should not be controlling where, for example, there is a clear indication of contrary legislative intent." Albernaz, supra, 67 L.Ed.2d at 284. The Blockburger test is also a rule of constitutional magnitude. Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187, 194 (1977); Albernaz, supra, 67 L.Ed.2d at 280 and 285, fn. 3. The clear indication of contrary legislative intent to which Albernaz refers is an "intent contrary to the presumption accorded these statutes after application of the Blockburger test." Albernaz, supra, 67 L.Ed.2d at 282. The presumption is that Congress, because it was silent upon the matter, intended to punish multiply the two offenses each of which required proof of an element which the other did not. Albernaz, supra, 67 L.Ed.2d at 282-283. Thus, had Congress expressed an intention to punish only singly the two offenses, the Blockburger test, as a rule of statutory construction, would not be controlling.[1]

2. The question presented is not an important question of federal law which should be settled by this Court, because its resolution will affect only the twenty-three respondents in this case.

The question presented, whether it be in the form proposed by petitioner or by respondents Collins, Eddie Greer, Hawkins and Martin, is not an important question of federal law which should be settled by this Court, because its resolution will affect only the twenty-three respondents in this case. As far as the undersigned

---

[1] Petitioner also asserts that Haggard conflicts with decisions of the United States District Court for the Eastern District of Missouri. Only conflicts with a federal court of appeals, not a federal district court, provide a basis for granting certiorari. Rule 17.1(b).

counsel knows, there are only two other persons, his clients, who will be affected, and then only if the State of Missouri takes the proper procedural steps, by this Court resolving the question presented. No person convicted of armed criminal action occurring on or subsequent to January 1, 1979 will be affected by this Court resolving the question presented.

Armed criminal action, §559.225, RSMo Supp. 1976, of which respondents Collins, Eddie Green, Hawkins and Martin were convicted, was enacted in C.C.S.H.B. 1231, 997, 1024, 1116, 1332 and 1346, 78th General Assembly, 2nd Session, Laws of Mo. 1975-76, pp. 780-781. It was effective August 13, 1976. C.C.S.H.B. 1231, 997, 1024, 1116, 1332, 78th General Assembly, 2nd Session, Laws of Mo. 1975-76, p. 842. The Criminal Code was enacted in S.B. 60, 79th General Assembly, 1st Session, Laws of Mo. 1977, pp. 658-718. It was effective January 1, 1979. S.B. No. 60, 79th General Assembly, 1st Session, Laws of Mo. 1977, p. 718. As a part of The Criminal Code, §559.225, RSMo Supp. 1976, was repealed and virtually identical §571.015, RSMo 1978, was enacted in lieu thereof. S.B. No. 60, 79th General Assembly, Laws of Mo. 1977, pp. 659, 663, 700. Also a part of The Criminal Code are §§556.041(1) and 556.046.1(1), RSMo 1978. S.B. No. 60, 79th General Assembly, Laws of Mo. 1977, p. 665. Thus, §559.225, RSMo Supp. 1976, existed in Missouri only from August 13, 1976 through December 31, 1978, and persons in Missouri convicted of armed criminal action occurring on or subsequent to January 1, 1979 are convicted under §571.015, RSMo 1978, as a part of The Criminal Code.

In State ex rel. Westfall v. Ruddy, No. 61958 (Mo. banc July 23, 1981), the Supreme Court of Missouri held that persons convicted of armed criminal action under §571.015, RSMo 1978, may not also be convicted of the underlying felony because of the operation of §§556.041(1) and 556.046.1(1), RSMo 1978.

> The offense which was the subject of Sours I and II was committed prior to January 1, 1979. The instant offense arose after January 1, 1979, and is therefore subject to the provisions of The Criminal Code. There is no doubt that the Missouri General Assembly intended and hoped that the substantially increased penalties imposed by the armed criminal action statute would deter

> or diminish the number of killings which, regrettably, have become commonplace when a weapon is used in the commission of a felony. This intention can be given effect by applying §§556.041 and 556.046 [,RSMo 1978,] to this case. In this way the armed criminal action statute remains a viable part of our criminal law and is available to punish more severely those who use weapons to commit felonies.
>
> Application of criminal code §§556.041(1) and 556.046.1(1) [,RSMo 1978,] permits the prosecutor to charge a defendant, in separate counts, with both the underlying felony ... and armed criminal action ... and, if the evidence supports both, to submit both felonies to the jury ....
>
> ....
>
> The prosecution is not prohibited from charging and trying the defendant for armed criminal action and [the underlying felony]. Assuming that the evidence in the case supports both crimes, the court may instruct on both armed criminal action and the underlying felony; however, the jury may convict of only one of them pursuant to §556.041(1) [,RSMo 1978]. This means that the jury must be instructed that, while they are not required to convict of any offense, that these two offenses are submitted in the alternative and the jury may not convict the defendant of more than one of them.

State ex rel. Westfall v. Ruddy, supra, slip op., 4-6 (footnotes omitted).

As a matter of Missouri and not federal constitutional law, persons convicted of armed criminal action occurring on or subsequent to January 1, 1979 may not also be convicted of the underlying felony. These persons will not be affected by this Court resolving the question presented, because the operation of Missouri statutes prevents them from being convicted of two offenses. Only twenty-three, and possibly twenty-five, persons convicted of armed criminal action occurring from August 13, 1976 through December 31, 1978 and, in addition thereto, the underlying felony will be affected by this Court resolving the question presented. Since so few people are affected by the question presented, it is not an important question of federal law, meriting this Court's resolution.[2]

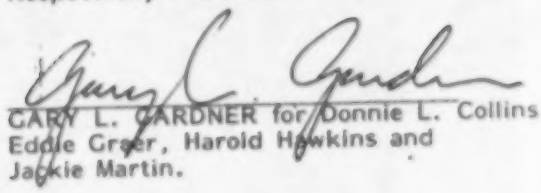
---

[2]Respondents Collins, Eddie Greer, Hawkins and Martin have not been released back into society because of their armed criminal action convictions being reversed. Those reversals in no way affected the validity of their convictions for the underlying felonies, which still stand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted



GARY L. GARDNER for Donnie L. Collins, Eddie Greer, Harold Hawkins and Jackie Martin.

JAMES W. FLETCHER for Donnie L. Collins, Eddie Greer, Harold Hawkins and Jackie Martin.

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Assistant Public Defender

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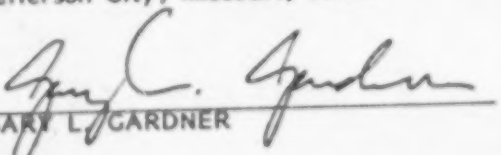
I hereby certify that one copy of the foregoing has been deposited in a United States mailbox, first class postage prepaid, on this the 26th day of October, 1981 to Steven W. Garrett, Assistant Attorney General, Supreme Court Building, P. O. Box 899, Jefferson City, Missouri, 65102.



GARY L. GARDNER

JAMES W. FLETCHER

No. 81-625

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

Office-Supreme Court, U.S.
FILED
OCT 22 1981
ALEXANDER L. STEVAS,
CLERK

STATE OF MISSOURI,
Petitioner,

v.

ROBERT LEE HAGGARD,
Respondent,

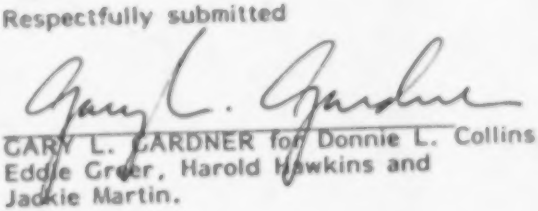
(and twenty-two cases also joined in this petition per Rule 19.4).

On Petition for Writ of Certiorari to the Supreme Court of Missouri.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Come now Donnie L. Collins, Eddie Greer, Harold Hawkins and Jackie Martin, respondents herein, by and through their court-appointed attorney, and move this Honorable Court for leave to file their Brief in Opposition without prepayment of costs, if any, and to proceed in forma pauperis herein pursuant to Rule 46. Each respondent sought from the Circuit Court of Jackson County, Missouri, the trial court below, leave to perfect their appeals to the Missouri Court of Appeals, Western District, in forma pauperis, and such leave was granted.

Respectfully submitted



GARY L. GARDNER for Donnie L. Collins, Eddie Greer, Harold Hawkins and Jackie Martin.

JAMES W. FLETCHER for Donnie L. Collins, Eddie Greer, Harold Hawkins and Jackie Martin.

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I hereby certify that one copy of the foregoing has been deposited in a United States mailbox, first class postage prepaid, on this the 30th day of October, 1981 to Steven W. Garrett, Assistant Attorney General, Supreme Court Building, P. O. Box 899, Jefferson City, Missouri, 65102.

GARY L. GARDNER

JAMES W. FLETCHER

No. 81-625

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

STATE OF MISSOURI,
Petitioner,

v.

ROBERT LEE HAGGARD,
Respondent.

(and twenty-two cases also joined in this petition per Rule 19.4).

On Petition for Writ of Certiorari to the Supreme Court of Missouri.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Jackie Martin, being first duly sworn, depose and say that I am a respondent in the above-entitled case; that in support of my motion for leave to proceed in forma pauperis I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe the State of Missouri is not entitled to redress; and that I desire to oppose the issues raised by the State in its petition for writ of certiorari.

I further swear that the responses which I have made to the questions and instructions below relating to my abiiity to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

Answer:

$7.50 per Mo.
Missouri Training Center for Men
McBeerly, Missouri

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

a. If the answer is yes, describe each source if income, and state the amount received from each during the past twelve months.

Answer:

No

3. Do you own any cash or checking or savings account?

a. If the answer is yes, state the total value of the items owned.

Answer:

No

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

a. If the answer is yes, describe the property and state its approximate value.

Answer:

No

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Answer:

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Jackie Martin
JACKIE MARTIN

SUBSCRIBED AND SWORN TO before me this 13 day of October, 1981.

E. James Moore Jr.
Notary Public

E. JAMES MOORE, JR.
Notary Public - State of Missouri
Commissioned in Randolph County
My Commission Expires June 18, 1983

I hereby certify that one copy of the foregoing has been deposited in a United States mailbox, first class postage prepaid, on this 30th day of October, 1981 to Steven W. Garrett, Assistant Attorney General, Supreme Court Building, P. O. Box 899, Jefferson City, Missouri, 65102.

Gary L. Gardner
GARY L. GARDNER

James W. Fletcher
JAMES W. FLETCHER

Opposition

4

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No. 81-625

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI,
Petitioner,

V.

WALLACE D. COUNSELMAN
Respondent,

(listed on first page are twenty-two cases also joined in this petition as per Rule 19.4)

BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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Attorney for Wallace D. Counselman Jr.

STATE OF MISSOURI,
Petitioner,
v.
DONALD L. COLLINS,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
STANLEY G. HELTON,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
RANDY LEE SINCLAIR,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
TIMOTHY CREWS,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
WILLIE TUNSTALL,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
TERRY GENE CREWS,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
ROBERT LOWERY,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
ROLLAN ANTHONY WILLIAMS,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
TOMMY BRYANT KENDRICK,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
JOHNNY WILLIAMS,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
WALLACE D. COUNSELMAN, JR.,
Respondent,

STATE OF MISSOURI
Petitioner,
v.
BOBBY JOE McGEE,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
MICHAEL L. WHITE,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
MARLON PAYNE,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
ROLLAN ANTHONY WILLIAMS
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
WILLIAM BROWN,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
JACKIE MARTIN,
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STATE OF MISSOURI,
Petitioner,
v.
EDDIE GREER,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
HAROLD HAWKINS,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
CARL FLETCHER,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
HANSFORD GASKIN,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
EDWARD H. PENNINGTON, JR.,

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THE REASONS FOR DENYING THE WRIT

Respondent, Wallace D. Counselman, Jr., agrees with, incorporates by reference, adopts the reasoning contained in all the other briefs in opposition to the writ of certiorari submitted by all the other respondents.

CONCLUSION

For the foregoing reasons it is prayed that this Honorable Court overrule Petitioner's Petition for writ of certiorari to the Supreme Court of Missouri.

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I hereby certify that a true and correct copy of the foregoing document was mailed, postage prepaid, this _____ day of February, 1982, to:

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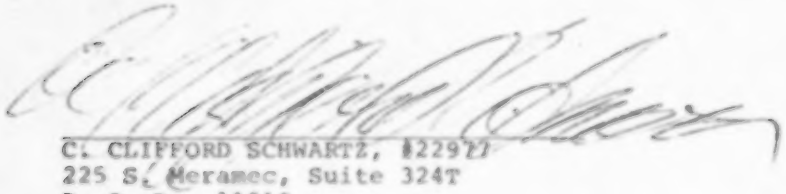

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Opposition

5

ORIGINAL

Number 81-625

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

RECEIVED
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STATE OF MISSOURI,

Petitioner,

vs.

TIMOTHY CREWS, ET AL.,

Respondents.

BRIEF IN OPPOSITION

TO GRANTING PETITION FOR WRIT OF CERTIORARI

LEONARD W. BUCKLEY, JR.

1215 Pine Street
St. Louis, Missouri 63103

314/421-1008

Attorney for Respondent
Timothy Crews

TABLE OF AUTHORITIES

Albernaz v. United States, 450 U.S. ___, 101 S Ct 1137 (1981).

Brintley v. Michigan, 444 US 948 (1979).

Coleman v. Alabama, 399 US 1 (1970).

Eastlake v. Forrest City Enterprises, Inc., 426 US 668 (1976).

Garner v. Louisiana, 368 US 157 (1961).

Jankovich v. Indiana Toll Road Co., 379 US 487 (1965).

Mandel v. Bradley, 432 US 173 (1977).

Memorial Hospital v Maricopa County, 415 US 250 (1973).

O'Brien v. Skinner, 414 US 524 (1973).

Sours v. State, 593 SW2d 208 (Mo en banc 1980); vacated and remanded, 445 US ___, 64 LEd2d 820, affirmed after remand, 603 SW2d 592 Mo en banc 1980); cert. den., No. 80-571 (Jan. 26, 1980).

State v. Haggard, 619 SW2d 44 (Mo en banc 1981).

United States v. Sampol, 636 F2d 621 (DC Cir 1980).

United States v. Simpson, 435 US 6 (1978).

United States v. Thirty-Seven (37) Photographs, 402 US 363; reh. den. 403 US 924 (1971).

Wayne County Prosecutor v. Recorder's Court Judge, 406 Mich. 374, 280 NW2d 794 (1979).

Whalen v. United States, 445 US 684 (1980).

Zacchini v. Scripp-Howard Broadcasting Co., 433 US 562 (1977).

STATUTES CITED

Section 559.225 RSMo (Supp 1976).

Section 560.120 RSMo (1969).

Section 560.135 RSMo (Supp 1975).

Number 81-625

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF MISSOURI

Petitioner,

vs.

TIMOTHY CREWS, ET AL.,

Respondents.

BRIEF IN OPPOSITION

TO GRANTING PETITION FOR WRIT OF CERTIORARI

The Repondent, Timothy Crews, in opposition to the granting of the Petition for Writ of Certiorari in this case, states as follows:

QUESTION PRESENTED

Whether the Writ of Certiorari should not issue because the decision issued by the Supreme Court of Missouri in State v. Haggard , 619 SW2d 44 (Mo en banc 1981) does not conflict with decisions of this Court and was based upon the authority of Sours v. State, 593 SW2d 208 (Mo en banc 1980); vacated and remanded, 445 US ___, 64 LEd2d 820, affirmed after remand, 603 (Mo en banc 1980), cert den., No. 80-571 (Jan. 26, 1981), which moots the issue raised herein.

REASON FOR DENYING THE WRIT

THE WRIT OF CERTIORARI SHOULD NOT ISSUE BECAUSE THE ISSUE RAISED BY PETITIONER IS IDENTICAL IN ALL RESPECTS TO THE ISSUE PRESENTED IN SOURS V. STATE, THE FINAL DISPOSITION OF WHICH MOOTS THE ISSUE PRESENTED HEREIN, NOT DOES THE IDENTICAL DECISION OF THE SUPREME COURT IN STATE V. HAGGARD, CONFLICT WITH ANY DECISION OF THIS COURT.

The issue raised before this Court as a result of the decision of the Missouri Supreme Court in Sours v. State, 593 SW2d 208 (Mo en banc 1980 (Sours I) was based on convictions for the crimes of robbery first degree by means of a dangerous and deadly weapon, Section 560.120, RSMo 1969 and Section 560.135 RSMo Supp 1975, and the armed criminal action Section 559.225 RSMo Supp 1976, the identical statutes under which Respondent here was convicted.

This Court vacated the decision of the Missouri Supreme Court and remanded the case for reconsideration in the light of Whalen v. United States, 445 US 684 (1980). Missouri v. Sours, 64 L Ed2d 820 (1980).

Upon remand, the Missouri Supreme Court, in Sours v. State, 603 SW2d 592 (Mo en banc 1980 (Sours II) noted that no opinion of the Supreme Court had considered a statute that contained wording similar to or identical to that found in Missouri's armed criminal action statute. Id at 593. The Missouri Supreme Court held, based on its construction of Missouri law, that the underlying felony, robbery first degree by means of a dangerous and deadly weapon, was either an included or lesser included offense of armed criminal action. See generally, United States v. Sampol, 636 F2d 621, 651-655 (DC Cir 1980). And as Petitioner notes in his Brief at page 18, the Court's holding in State v. Haggard, supra is identical to the holdings in the Sours cases.

The Missouri Supreme Court has definitively decided, which this Court may not dispute, as follows:

1. It was the intention of the Missouri General Assembly that separate and multiple punishments be imposed for armed criminal

action and the underlying felony.

2. Every element of the underlying felony herein, robbery first degree by means of a dangerous and deadly weapon, is included in Armed Criminal Action, that is, proof of robbery first degree by means of a dangerous and deadly weapon does not require proof of any additional elements not needed to prove Armed Criminal Action; that is, Armed Criminal Action includes the underlying felony and that Armed Criminal Action and robbery first degree are in law and fact the same. E.g., Whalen v. United States, supra Eastlake v Forrest City Enterprises, Inc., 426 US 250 (1973); O'Brien v. Skinner, 414 US 524 (1973); Garner v. Louisiana, 368 US 157 (1961); Haggard v. State, supra.

Petitioner' reliance on Brintley v Michigan, 444 US 948 (1979) and Petitioner' allegations that the decision in Brintley should be controlling because of similarities in the Michigan statutes involved in Brintley and the Missouri statutes ignores the effect of the holding of the Missouri Supreme Court that no Supreme Court decision has considered a statute that contained wording similar or identical to that found in Missouri's armed criminal statute. Sours v. State 603 SW2d at 593.

The Michigan Supreme Court, in Wayne County Prosecutor v. Recorder's Court Judge, 406 Mich 374, 280 NW 2d 794 (1979), held, in essence, that the Michigan felony firearms statute created a separate and distinct crime from the underlying felony so that the two offenses were not the same. This is contrary to the Missouri Supreme Court's holding that, based on state law, the armed criminal aciton statute and robbery first degree by means of a dangerous and deadly weapo n are the same offense.

The construction of the armed criminal action statute by the Missouri Supreme Court is binding upon this Court because the United States Supreme Court lacks jurisdiction to construe state laws. United States v Thirty-Seven Photographs, 402 US 363, reh. den., 403 US 924 (1971); Coleman v. Alabama, 399 US 1 (1970) As was stated in Memorial Hospital v. Maricopa County, supra at 256, "It is not our function to construe a state statute contrary to the construction given it by the highest court of a state. See also, O'Brien v. Skinner, supra.

It is of no import that the Sours court went on to also base its decision on federal constitutional grounds.

> It is undoubtedly "'the settled rule that where judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails is the non-federal ground is independent of the federal ground and adequate to support the judgment. Fox Film Corporation v. Muller, 296 U.S. 207, 210, (80 L.Ed. 158, 159, 56 S.Ct. 183)." Cramp v. Board of Public Instruction, 368 U.S. 278, 281 7 L.Ed. 2d 285, 288, 82 S.Ct. 275.

Jankovich v. Indiana Toll Road Company, 379 U.S. 487 (1965).

In Jankovich, the Indiana Supreme Court invalidated a city ordinance as authorizing an unconstitutional taking without compensation. The decision was based upon both the Indiana constitution and the United States Constitution. This Court held that the ruling was based upon adequate state grounds and therefore dismissed the writ of certiorari as improvidently granted. In the same manner, the writ of certiorari should not issue in the case at hand.

The Missouri Supreme Court based its decision on adequate, independent state grounds.

> This is not a case . . . where the lower court opinion as a whole "leaves the impression that the court probably felt constrained to rule as it did because of (decisions applying the 14th Amendment)," Minnesota v. National Tea Company, supra, 309 U.S. at 554-555, 84 L.Ed. at 922, or "because it felt under compulsion of federal law as enunciated by this Court so to hold," Mississippi ex rel. Southern Railroad Company v. Mayfield, 340 U.S. 1, 5, 95 L.Ed. 3, 8, 71 S. Ct. 1, with the result that the state and federal grounds are "so interwoven that we are unable to conclude that the judgment rests upon an independent interpretation of the state law," State Tax Commissioner v. Van Catt, 306 U.S. 511, 514, 83 L.Ed. 950, 952, 29 S.Ct. 605.

Jankovich, supra, at 443.

In order to follow the established practice of avoiding constitutional decisions where possible, United States v. Simpson, 435 U.S. 6 (1978), the writ of certiorari should not issue because the lower court's decision is supported by adequate state grounds. The Supreme Court's power "is to correct wrong judgments, not to revise opinions." Zacchini v. Scripp-Howard Broadcasting Company, 433 U.S. 562, 53 L.Ed. 2d 965, 970 (1977).

Finally, this Court's summary dismissal of Brintley v. Michigan, supra, does not require the granting of the petition

for certiorari in this case, as Petitioner suggests. An unexplicated disposition of a lower court's decision settles the case for the parties but does not necessarily determine the validity of the lower court's reasoning as expressed in its opinion. Mandel v. Bradley, 432 U.S. 173 (1977). Brintley, supra, presented the question whether separate convictions and consecutive sentences for both a felony and for felony firearm violate the Michigan and the United States constitutional prohibitions against double jeopardy. The federal constitutional issue was never reached, however, for the case was decided as a matter of Michigan's highest court construing its own statute in light of its own laws. Michigan is entitled to reach a decision different from that reached by Missouri and the principle involved in the two cases remains unchanged -- since the decisions were reached by ruling upon adequate, independent state grounds, there is no substantial federal question..

This Court's recent decision in Albernaz v. United States, No. 450 U.S. ___, 101 S.Ct. 1137, 67 L.Ed. 2d 275 (1981), does not dictate a contrary result with respect to the issues raised herein. The holding in Albernaz was based on the finding of the Supreme Court that the statutes in questions represented two (2) separate offenses. Justices Stewart, Marshall, and Stevens, who joined in the majority opinion in Whalen, supra, concurred in the judgment in Albernaz, supra, stating that a legislature may not provide cumulative sentences for the same crime.

Thus, the result reached by the Missouri Supreme Court in State v. Haggard, supra, remains unchanged by the holding in Albernaz.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should not be granted.

Respectfully submitted,

Leonard W. Buckley, Jr. #25161
Attorney for Respondent Timothy Crews
1215 Pine Street
St. Louis, Missouri 63103
314/421-1008

RECEIVED
MAR 5 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT
OF THE UNITED STATES

STATE OF MISSOURI,

Petitioner

vs.

ROBERT LEE HAGGARD, et al.,

Respondent.

Cause No. 81-625

MOTION FOR RESPONDENT
WALLACE D. COUNSELMAN, JR.
IN FORMA PAUPERIS

Comes now Wallace D. Counselman, Jr., Respondent, and moves this Honorable Court to grant him Leave to Appeal in Forma Pauperis. Respondent has previously filed in this Court A Motion For Leave to Appeal in Forma Pauperis and Affidavit in Cause No. 80-754, and incorporates said Motion into his present Motion For Leave to Appeal in Forma Pauperis.

Respondent further states for his Motion that his financial situation has not changed from his prior filing of his Motion For Leave to Appeal In Forma Pauperis, and that Respondent is still unable to pay for the costs of the above-captioned cause.

WHEREFORE, Wallace D. Counselman, Jr., Respondent, respectfully requests that this Honorable Court grant him Leave to Appeal in Forma Pauperis.

SHAW, HOWLETT & SCHWARTZ

By _____
C. Clifford Schwartz, Esq.
Attorneys for Respondent
225 S. Meramec, Suite 324T
P.O. Box 11210
Clayton, MO 63105
725-9700

CERTIFICATE OF SERVICE

Copy hereof mailed this _____ day of _____, 1982, to the following:

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Sedalia, MO 65301

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Lee Nation
402 Seville Square
Kansas City, MO 64112

C. CLIFFORD SCHWARTZ, Esq.

RECEIVED
NOV 9 1981
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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI,

Petitioner,

-vs-

TIMOTHY CREWS,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, TIMOTHY CREWS, being first duly sworn, depose and say that I am a Respondent in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are none save to defend the decision of the Court of Appeals.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting the appeal are true.

1. Are you presently employed?

   No. I have been an inmate in the State Penitentiary since 1978.

2. Have you received within the past twelve (12) months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   No.

3. Do you own any case or checking or savings accounts?

   No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

   None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Timothy Crews
Missouri Department of Corrections
P.O. Box 900
Jefferson City, Missouri 65102

Subscribed and sworn to before me this day of 1981.

Notary Public

My Commission Expires:

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

Justice, United States Supreme Court

Opposition

6

No. 81-625

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

STATE OF MISSOURI,

Petitioner

v.

ROBERT LEE HAGGARD,

Respondent,

(and twenty-two cases also joined in this petition per Rule 19.4).

On Petition for Writ of Certiorari to the Supreme Court of Missouri.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

JOSEPH W. DOWNEY
Public Defender

HENRY B. ROBERTSON
Assistant Public Defender

1320 Market Street, Room 62
St. Louis, Missouri 63103
(314) 622-4241

Attorneys for Respondents
Terry Gene Crews, Hanford
Gaskin, Marlon Payne, Willie
Tunstall, and Michael White

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No. 81-625

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

STATE OF MISSOURI,
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v.

ROBERT LEE HAGGARD,
Respondent,

(and twenty-two cases also joined in this petition per Rule 19.4).

On Petition for Writ of Certiorari to the Supreme Court of Missouri.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Opinions Below

This list updates in part the list contained in the Petition for Certiorari.

State of Missouri v. Haggard, 619 S.W.2d 44 (Mo. banc 1981);

State of Missouri v. Terry Gene Crews, 619 S.W.2d 76 (Mo. banc 1981);

State of Missouri v. Payne, 619 S.W.2d 75 (Mo. banc 1981);

State of Missouri v. Tunstall, 619 S.W.2d 71 (Mo. banc 1981);

State of Missouri v. White, 619 S.W.2d 79 (Mo. banc 1981).

Constitutional and Statutory Provisions Involved

Respondents add to the statutory provisions cited by petitioner the following.

Section 556.041(1), RSMo 1978, reads in relevant part:

> Section 556.041. Limitations on conviction for multiple offenses. -- When the same conduct of a person may establish the commission of more than one offense he may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if
>
> (1) One offense is included in the other, as defined in section 556.046;

Section 556.046.1(1), R.S.Mo. 1978, reads in relevant part:

> 556.046. Conviction of included offenses. -- 1. A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when
>
> (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged;

Summary of Argument

I

The decision of the Missouri Supreme Court does not conflict with applicable decisions of this Court because this Court has not decided the issue presented here.

II

The federal constitutional issue involved has been nullified by subsequent enactments of the Missouri General Assembly and by construction of those enactments by the Missouri Supreme Court.

Argument

I

Petitioner contends that the decision of the Missouri Supreme Court in State v. Haggard, 619 S.W.2d 44 (Mo. banc 1981), holding that Missouri's armed criminal action statute, Section 559.225, R.S.Mo. Supp. 1976, violates the double jeopardy clause of the United States Constitution, Amendment V, conflicts with decisions of this Court. Principal reliance is placed on Albernaz v. United States, 450 U.S. _____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). The separate offenses of which Albernaz was convicted satisfied the test of Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), each requiring proof of a fact the other did not. Albernaz does not govern the situation presented in these cases of

simultaneous conviction for armed criminal action and the underlying felony necessary to be proved under the Missouri armed criminal action statute.

Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977), although distinguishable to the extent that it involved multiple prosecutions, stands for the proposition that when a greater crime (in Harris, felony-murder) cannot be proved without proof of a lesser crime (the underlying felony), the two are the same offense for double jeopardy purposes.

In Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), it was decided that the Congressional intent was not to authorize consecutive sentences for felony-murder and the underlying felony of rape. Whalen did not reach the issue of whether Congress could constitutionally have authorized consecutive sentences.

Petitioner, in his "Questions Presented," cites Brintley v. Michigan, 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979). This makes too much of a memorandum decision dismissing the appeal for want of a substantial federal question. Such a decision breaks no new ground, but applies only to the "precise issues" and "particular facts" involved in the judgment appealed from. Mandel v. Bradley, 432 U.S. 173, 176, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977). It intimates nothing with regard to Missouri law.

II

The issue on which petitioner seeks review is not "an important question of federal law which has not been, but should be, settled by this court . . ." Supreme Court Rule 17.1(c). It has, in fact, been rendered moot by subsequent enactments of the Missouri General Assembly.

In 1977, the Legislature enacted a new Criminal Code, Section 556.011 et seq., R.S.Mo. 1978, effective January 1, 1979. Two provisions of that Code are pertinent here. Section 556.041 forbids conviction of more than one offense arising out

of the same conduct if "(1) One offense is included in the other, as defined in section 556.046." The latter provides in relevant part:

> 1. A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; . . .

The Missouri Supreme Court has recently considered the impact of these provisions on the armed criminal action statute, now Section 571.015, R.S.Mo. 1978, reenacted as part of the same Criminal Code. In State ex rel. Westfall v. Ruddy, _____ S.W.2d _____, No. 61958 (Mo. banc 1981), the court held that conviction of both armed criminal action and the underlying felony was forbidden by the above-cited statutes. The prosecution henceforward may charge an accused with both offenses and may submit both to the jury, but only in the alternative.

With Ruddy, the federal double jeopardy issue has been rendered moot. Since this Court does not review a state supreme court's construction of a state statute, Memorial Hospital v. Maricopa County, 415 U.S. 250, 256, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974), a grant of certiorari would serve no purpose.

Respondents submit that the federal question in these cases is untimely presented and of no such significance as to merit review on writ of certiorari.

Conclusion

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

JOSEPH W. DOWNEY
Public Defender

HENRY B. ROBERTSON
Assistant Public Defender

1320 Market Street, Room 62
St. Louis, Missouri 63103
(314) 622-4241

Attorneys for Respondents
Terry Gene Crews, Hanford
Gaskin, Marlon Payne, Willie
Tunstall, and Michael White

ORIGINAL

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OCT 26 1981
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SUPREME COURT, U.S.

No. 81-625

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

STATE OF MISSOURI,
Petitioner

v.

ROBERT LEE HAGGARD,
Respondent,

(and twenty-two cases also joined in this petition per Rule 19.4).

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondents Terry Gene Crews, Hanford Gaskin, Marlon Payne, Willie Tunstall, and Michael White move this court for an order permitting them to proceed in this court in forma pauperis, pursuant to Supreme Court Rule 46, as parties respondent in the above-captioned cause. Affidavits in support of this motion are attached hereto.

Respondents state that they all moved for and were granted leave to appeal as poor persons by the Circuit Court of the City of St. Louis, Missouri. All subsequently were and are still represented by the Public Defender of that city.

Respectfully submitted,

JOSEPH W. DOWNEY
Public Defender

HENRY B. ROBERTSON
Assistant Public Defender

1320 Market Street, Room 62
St. Louis, Missouri 63103
(314) 622-4241

Attorneys for Respondents Terry Gene Crews, Hanford Gaskin, Marlon Payne, Willie Tunstall, and Michael White

Subscribed and sworn to before me this 23 day of October, 1981.

Barbara J. Ingerson
Notary Public

My commission expires: 9/27/85

On Petition for Writ of Certiorari to the Supreme Court of Missouri.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Willie Tunstall, being first duly sworn, depose and say that I am a respondent in the above-entitled case; that in support of my motion for leave to proceed in forma pauperis, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe the State of Missouri is not entitled to redress; and that I desire to oppose the issues raised by the State in its petition for writ of certiorari.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you present employed?

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of salary and wages per month which you received.

Answer: No

2. Have you received, within the past twelve months, any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

Answer: No

3. Do you own any cash or checking or savings account?

   a. If the answer is yes, state the total value of the items owned.

Answer: No

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   a. If the answer is yes, describe the property and state its approximate value.

Answer: No

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Answer: None

I understand that a false statement or answer to my questions in this affidavit will subject me to penalties for perjury.

[signature] 3214

[signature]

JOSEPH W. DOWNEY
Public Defender
22nd Judicial Circuit
1320 Market Street
St. Louis, MO 63103
(314) 622-4241

Henry Robertson

HENRY ROBERTSON
Assistant Public Defender
22nd Judicial Circuit
1320 Market Street
St. Louis, MO 63103
(314) 622-4241

Subscribed and sworn to before me this_____ day of OCT 20 1981, 1981.

Oscar D Dunbar

Notary Public

OSCAR D. DUNBAR
Notary Public, State of Missouri
My Commission Expires August 1, 1984

My commission expires:_____

On Petition for Writ of Certiorari to the Supreme Court of Missouri.

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, Hanford Gaskin, being first duly sworn, depose and say that I am a respondent in the above-entitled case; that in support of my motion for leave to proceed in forma pauperis, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe the State of Missouri is not entitled to redress; and that I desire to oppose the issues raised by the State in its petition for writ of certiorari.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you present employed?

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of salary and wages per month which you received.

Answer: No

2. Have you received, within the past twelve months, any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

Answer: No

3. Do you own any cash or checking or savings account?

   a. If the answer is yes, state the total value of the items owned.

Answer: No

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   a. If the answer is yes, describe the property and state its approximate value.

Answer: No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Answer: None

I understand that a false statement or answer to my questions in this affidavit will subject me to penalties for perjury.

Stanford Haskins

JOSEPH W. DOWNEY
Public Defender
22nd Judicial Circuit
1320 Market Street
St. Louis, MO 63103
(314) 622-4241

Henry Robertson

HENRY ROBERTSON
Assistant Public Defender
22nd Judicial Circuit
1320 Market Street
St. Louis, MO 63103
(314) 622-4241

Subscribed and sworn to before me this_____ day of OCT 20 1981, 1981.

Oscar D. Dunbar

Notary Public

OSCAR D. DUNBAR
Notary Public, State of Missouri
My Commission Expires August 1, 1984

My commission expires:_____

On Petition for Writ of Certiorari to the Supreme Court of Missouri.

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, Terry Crews, being first duly sworn, depose and say that I am a respondent in the above-entitled case; that in support of my motion for leave to proceed in forma pauperis, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe the State of Missouri is not entitled to redress; and that I desire to oppose the issues raised by the State in its petition for writ of certiorari.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you present employed?

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of salary and wages per month which you received.

Answer: YES, $7.50 MONTHLY

2. Have you received, within the past twelve months, any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

Answer: YES, APPROX $35.00

3. Do you own any cash or checking or savings account?

   a. If the answer is yes, state the total value of the items owned.

Answer: NO

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   a. If the answer is yes, describe the property and state its approximate value.

Answer: NO

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Answer: [redacted] NO-ONE

I understand that a false statement or answer to my questions in this affidavit will subject me to penalties for perjury.

Terry L. Crews 35840

JOSEPH W. DOWNEY
Public Defender
22nd Judicial Circuit
1320 Market Street
St. Louis, MO 63103
(314) 622-4241

HENRY ROBERTSON
Assistant Public Defender
22nd Judicial Circuit
1320 Market Street
St. Louis, MO 63103
(314) 622-4241

Subscribed and sworn to before me this_____ day of OCT 20 1981, 1981.

Oscar D Dunbar

Notary Public

OSCAR D. DUNBAR
Notary Public, State of Missouri
My Commission Expires August 1, 1984

My commission expires:

No. 81-625

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

STATE OF MISSOURI,
Petitioner

v.

ROBERT LEE HAGGARD,
Respondent,

(and twenty-two cases also joined in this petition per Rule 19.4).

PROOF OF MAILING - AFFIDAVIT

I, Joseph W. Downey, one of the attorneys for Respondents Terry Gene Crews, Hanford Gaskin, Marlon Payne, Willie Tunstall, and Michael White, and a member of the Bar of the Supreme Court of the United States, hereby certify that the enclosed Brief in Opposition to Petition for Certiorari was placed in a mailbox in this building, 1320 Market Street, St. Louis, Mo., 63103, first class postage prepaid, on October 23, 1981, addressed to the Clerk of the Supreme Court, 1 First St., N.E., Washington, D.C. 20543, within the time allowed for filing and that a copy was mailed at the same time and place to Philip M. Koppe and Steven Garrett, Assistant Attorneys General, P.O. Box 899, Jefferson City, Mo. 65102.

JOSEPH W. DOWNEY
1320 Market Street, Room 62
St. Louis, Missouri 63103
(314) 622-4241

Attorney for Respondents
Terry Gene Crews, Hanford
Gaskin, Marlon Payne, Willie
Tunstall, and Michael White

Subscribed and sworn to before me this 23 day

of October, 1981.

Barbara J. Ingemunson
Notary Public

My commission expires: 9/27/85

Opposition

7

RECEIVED
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NO 81-625

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1981

STATE OF MISSOURI,
PETITIONER

VS

CARL FLETCHER,
RESPONDENT

STATEMENT OF RESPONDENT CARL FLETCHER

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

LEE M. NATION
Attorney at Law
NATION AND CURLEY
402 Seville Square
500 Nichols Road
Kansas City Missouri 64112
(816) 931-9747

Counsel for respondent

INDEX

STATEMENT OF RESPONDENT CARL FLETCHER.....1

MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS.....2

STATEMENT OF CARL FLETCHER

Respondent, by counsel, respectfully replies to the petition for certiorari filed by petitioner herein, the State of Missouri, by hereby, adopting, incorporating and agreeing with the reasoning contained in the brief filed in opposition to the Writ of Certiorari by Respondent Rollan Anthony Williams and the additional reasoning contained in the Statement of Respondent Edward H. Pennington Jr.

WHEREFORE, Respondent requests that this Court allow him to join in the above mentioned statements and briefs and to incorporate these briefs in to his response; and to deny the writ of certiorari requested by petitioner, the State of Missouri, in the pending cause.

Respectfully submitted,

LEE M. NATION
NATION & CURLEY
402 Seville Square
500 Nichols Road
Kansas City, Missouri 64112
(816) 931-9747

Member of the Bar of the
United State Supreme Court

Member of the Bar of the
State of Missouri

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, by Counsel, respectfully requests this Court to grant him leave to appeal in forma pauperis in the above cause. In support of this request, respondent states:

1. Respondent is presently incarcerated in the Missouri State penitentiary in Jefferson City, Missouri. As such, respondent has no income with which to pay the costs of this action.

2. Respondent has no stocks, bonds, savings, property, real or otherwise which could be used to secure funds necessary to defend the writ of the petitioner herein.

3. Respondent's family, likewise, has no such income, stocks, savings, bonds or property which could be used to pay the costs of this action.

WHEREFORE, Respondent respectfully requests this Court to grant him leave to proceed in forma pauperis.

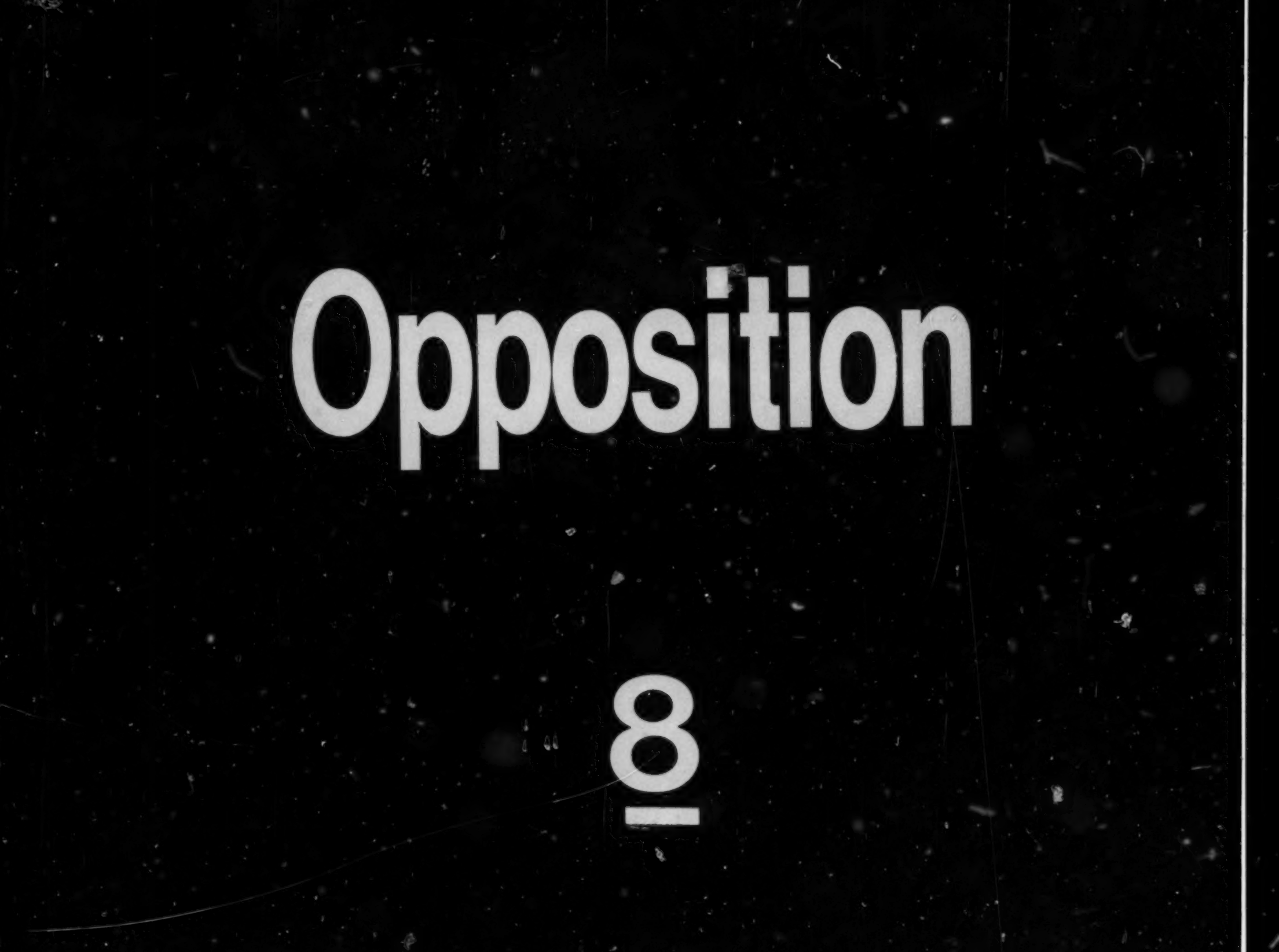
Respectfully Submitted,

LEE M. NATION
NATION AND CURLEY
402 Seville Square
500 Nichols Road
Kansas City, Missouri 64112
(816) 931-9747

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true copy of the foregoing to the Office of the Attorney General for the State of Missouri, Supreme Court, Building, Jefferson City, Missouri, Counsel for petitioner, this 24th day of February, 1982.

Opposition



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ALEXANDER L. STEVAS,
Clerk

No. 81-625

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF MISSOURI,
Petitioner,

v.

ROBERT LEE HAGGARD,
Respondent.

(listed on first page are twenty-two cases also joined in this petition as per Rule 19.4)

STATEMENT OF DONALD GREER

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STATE OF MISSOURI,
Petitioner,
v.
DONALD L. COLLINS,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
STANLEY G. HELTON,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
RANDY LEE SINCLAIR,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
TIMOTHY CREWS,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
WILLIE TUNSTALL,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
TERRY GENE CREWS,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
ROBERT LOWERY,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
ROLLAN ANTHONY WILLIAMS,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
TOMMY BRYANT KENDRICK,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
JOHNNY WILLIAMS,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
WALLACE D. COUNSELMAN, JR.,
Respondent,

STATE OF MISSOURI
Petitioner,
v.
BOBBY JOE McGEE,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
MICHAEL L. WHITE,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
MARLON PAYNE,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
ROLLAN ANTHONY WILLIAMS
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
WILLIAM BROWN,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
JACKIE MARTIN,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
EDDIE GREER,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
HAROLD HAWKINS,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
CARL FLETCHER,
Respondent,

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HANSFORD GASKIN,
Respondent,

STATE OF MISSOURI,
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STATEMENT OF DONALD GREER

Respondent Donald Greer agrees with, incorporates by reference, and adopts the reasoning contained in the Brief in Opposition to the Writ submitted by Respondent Rollan Anthony Williams through his counsel Michael J. Gorla. A copy of which is attached as Respondent Donald Greer's Exhibit 1.

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THE REASONS FOR DENYING THE WRIT

Petitioner contends that the Missouri Supreme Court's decision in Sours v. State, 603 S.W.2d 592 (Mo. banc 1980), which was affirmed in State v. Haggard, 619 S.W.2d 44 (Mo. banc 1981), conflicts with the applicable decisions of this Court including the recent decisions in Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), and Albernaz v. United States, 450 U.S. , 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). Respondent Williams respectfully disagrees and submits that a writ of certiorari should not issue to review the judgment of the Missouri Supreme Court.

In Whalen, supra, the District of Columbia Court of Appeals affirmed the consecutive sentences imposed in a single prosecution for the offense of rape and the offense of felony murder, the killing committed in perpetration of the rape. This Court reversed on the finding that Congress had not authorized consecutive sentences for the two offenses, and thus the trial court had exceeded its authority.

Contrary to the State of Missouri's argument in its petition for certiorari, the majority opinion in Whalen did not conclude that a defendant can be punished in one proceeding for two crimes if the legislature so intends where both offenses are considered the same offense under the test articulated in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Petitioner bases its interpretation of Whalen on language contained in the concurring and dissenting opinions. It appears that such a view may be held by the Chief Justice, Justices White, Rehnquist and Blackman, but the fact is the majority in Whalen made it clear that it was basing its decision on statutory interpretation and not on constitutional grounds. Since this Court found that Congress did not intend to punish a defendant both for rape and the killing committed in the perpetration of said rape, the Whalen case was disposed of without resort to the application of the double jeopardy clause of the Fifth Amendment.

The Missouri Supreme Court correctly interpreted and applied Whalen in Sours v. State, 603 S.W.2d 592 (Mo. banc 1980). After examining the legislative intent behind the armed criminal action statute, §559.225 RSMo. Supp. 1976, and applying every possible test and standard available for statutory construction, the Missouri Supreme Court concluded that the "General Assembly did clearly intend to impose two punishments for armed criminal action and the lesser included offense." Sours v. State, supra, 603 S.W.2d at 603. The statutory interpretation which was dipositive of the issue in Whalen does not solve the problem in Sours.

Likewise, the case of Albernaz v. United States, supra, does not mandate that the Missouri Supreme Court change its decision in Sours v. State, sup .n Albernaz, this Court addressed the issue of whether the double jeopardy clause of the Fifth Amendment was violated by the imposition of consecutive sentences for the offenses of conspiracy to import marijuana, and conspiracy to distribute marijuana. Applying the Blockburger test, this Court concluded that there was not a double jeopardy-multiple punishment problem since each offense requires proof of a fact which the other did not, and thus, said offenses are separate and distinct. Countary to the view adherred to by the petitioner, the Albernaz decision was not based on the conclusion that when the legislature so intends, multiple punishment can constitutionally be imposed for two offenses in spite of the fact that said offenses are considered the same offense under the Blockburger test. Since the offenses of armed criminal action and its predicate felony are the same offense under Blockburger v. United States, supra, this Court's decision in Albernaz is not applicable to the Missouri Supreme Court's decision in Sours v. State, supra.

Petitioner also contends that the Sours and Haggard decisions conflict with this Court's summary dismissal in Brintley v. Michigan, 444 U.S. 948, 100 S.Ct. 419, 62 L.Ed.2d 317 (1979). As set out in the State of Missouri's petition at page 8, the following question was sought to be presented in Brintley:

> "Does double jeopardy clause prohibit separate convictions and sentences for violation of state statute, §750.227(b), proscribing possession of firearm during commission of felony and for underlying felony (armed robbery in one case and second degree murder in another), where all proofs required to establish violation of underlying felony are necessarily required for proof of violation of §750.227(b) where there is no evidence that weapon has been possessed for any other purpose than the commission of underlying felony, where underlying felony is specifically charged as a felony element of firearms possession charge, and where (in armed robbery case) state has already augumented punishment for armed robberies above punishment imposed for unarmed robberies. 26 Crim.L.Rep. 4113 §750.227(b), M.C.L.A. appears in Appendix D of State's Petition).

What is not pointed out in the petition for certiorari is that in Wayne County Prosecutor v. Recorder's Court Judge, 406 Mich. 374, 280 N.W.2d 794 (1979), one of the cases consolidated in Brintley, the Michigan Supreme Court determined that the Michigan felony firearms statute and the underlying felony were distinct and separate offenses. This Court is bound by the construction of a state statute by the highest court of a state, Memorial Hospital v. Maricopa County, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1973), and thus, this Court's dismissal for no substantial federal question in Brintley was warranted by the Michigan Supreme Court's finding that the felony firearms statute and the underlying felony are not the same offense. As stated earlier herein, the Missouri Supreme Court in Sours v. State, supra, has determined that armed criminal action, and the underlying felony are the same offense, and so, this Court's summary dismissal in Brintley is inapplicable to the situation in Missouri.

Finally, petitioner contends that Sours and Haggard conflict with the decisions of this Court interpreting the meaning and scope of the double jeopardy clause of the U.S. Constitution. The Missouri Supreme Court has set out a complete and thorough analysis of the law in this area, and its analysis correctly interprets and applies the decision of this Court. Sours v. State, supra, 603 S.W.2d at 603-606. Said analysis emphasizes that this Court has consistently stated that the double jeopardy clause of the U.S. Constitution serves three purposes. First, it protects against a second prosecution for the same offense after an acquittal. Second, it protects against a second prosecution for the same offense after a conviction. Third, it protects against multiple punishment for the same offense.

North Carolina v. Pearce, 395 U.S. 711 89 S.Ct. 2072, 23 L.Ed.2d 656; Brown v. Ohio, 432 U.S. 161 97 S.Ct. 2221, 53 L.Ed.2d 168 (1977); Harris v. Oklahoma, 443 U.S. 682 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977); Illinois v. Vitale, 447 U.S. 410, 100 S.Ct. 2260 65 L.Ed.2d 2228 (1980).

While petitioner contends that the above authorities only apply in situations involving successive prosecutions and that the legislature can authorize punishment in a single proceeding for both an offense and a lesser included offense, such is not correct. While the first two purposes of double jeopardy deal with the problem of successive prosecutions, the third purpose does not. In fact, if the multiple punishment protection dealt only with sucessive prosecutions, then the third purpose would be nothing more than a restatement of the other two. The protection against multiple punishment for the same offense would be rendered useless were the state able to do in one prosecution what it cannot do in two prosecutions. Regarding the petitioner's contention that the legislature can constitutionally authorize punishment for both an offense and a lesser included offense, if that were true, the protection against multiple punishment, which was recently cited with approval in Illinois v. Vitale, supra, would become a nullity.

As stated earlier, the Missouri Supreme Court has decided that armed criminal action §559.225 RSMo. Supp. 1976, and the underlying felony are the same offense, and that the Missouri legislature has intended to separately punish both offenses. This court is bound by the Missouri Supreme Court's interpretation of Missouri statutes. Memorial Hospital v. Maricopa County, supra. Therefore, applying the teachings of this Court, to prosecute and convict a defendant of both armed criminal action and the underlying felony constitutes multiple punishment for the same offense in violation of the double jeopardy clause of the Fifth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, respondent submits that petitioner's writ of certiorari be denied.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was mailed, postage prepaid, this 9th day of February, 1982, to:

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Opposition

9

NO. 81-625

IN THE

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OCTOBER TERM, 1981

STATE OF MISSOURI,

Petitioner

v.

ROBERT LEE HAGGARD, et al.

Respondents.

RESPONDENT TOMMY BRYANT KENDRICK'S

BRIEF IN OPPOSITION

TO GRANTING PETITION FOR WRIT OF CERTIORARI

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North Carolina v. Rice, 404 U.S. 244 (1971);

O'Brien v. Skinner, 414 U.S. 524 (1973);

Sours v. State, 593 S.W.2d 208 (Mo.Banc 1980);

Sours v. State, 603 S.W.2d 592 (Mo.Banc 1980);

State v. Crate, 493 S.W.2d 1 (Mo.Ct.App. at St.L. 1973);

State v. Frey, 459 S.W.2d 359 (Mo.1970);

State v. Kendrick, 606 S.W.2d 643 (Mo.1980) (advance sheet);

United States v. DiFrancesco, 66 L.Ed.2d 328 (1980);

Wayne County Prosecutor v. Recorder's Court Judge, 406 Mich. 374, 280 N.W.2d 794 (1979);

Whalen v. United States, 445 U.S. 684 (1980);

STATUTES CITED

Mo.Rev.Stat.Sec. 559.225

Mo.Rev.Stat.Sec. 571.015

Mo.Rev.Stat.Sec. 560.120

Mo.Rev.Stat.Sec. 556.041

Mo.Rev.Stat.Sec. 556.046

CONSTITUTIONAL PROVISION CITED

United States Constitution, Fifth Amendment

NO. 81-625

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OCTOBER TERM, 1981

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RESPONDENT TOMMY BRYANT KENDRICK'S

BRIEF IN OPPOSITION

TO GRANTING PETITION FOR WRIT OF CERTIORARI

The Respondent, TOMMY BRYANT KENDRICK, in opposition to the granting of the petition for writ of certiorari in this case, states as follows:

OPINION BELOW

The opinion of the Missouri Supreme Court in this case is reproduced by the Petitioner in its Appendix A to the petition (pp. A-353-355) and is before this Court. It also has been reported as State v. Kendrick, 606 S.W.2d 643 (Mo. 1980). The opinion of the Missouri Supreme Court after re-examination as ordered by this Court is reproduced in the same appendix (pp. A-117-119).

JURISDICTIONAL STATEMENT

The Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. Sec. 1257(3). The Petitioner, however, fails to state in its jurisdictional statement what portion of that statute is purportedly applicable in this case. Presumably, however, the Petitioner claims that this Court has jurisdiction to review the holding of the Missouri Supreme Court on the basis that "the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution. . .of the United States." Again presumably, it is the Missouri Supreme Court's holding with regard to the "validity" of Mo.Rev.Stat.Sec. 559.225 (Supp. 1976), the armed criminal action statute, which the Petitioner feels provides the jurisdictional basis in this Court. However, it is to be noted that the Missouri Supreme Court has not invalidated Section 559.225 (renumbered effective January 1, 1979, as Mo.Rev.Stat.Sec. 571.015 (1979)) and prosecutions under that section are still authorized. State ex rel. Westfall v. Ruddy, 621 S.W.2d 42 (Mo.Banc 1981) (advance sheet). Under these circumstances, the jurisdictional statement of the Petitioner is inadequate to merit review by this Court.

QUESTIONS PRESENTED

1. Whether this case presents an issue in a manner that warrants the exercise of the certiorari jurisdiction of this Court?

2. Whether imposing separate punishments in a single state proceeding both for the offense of committing a felony by means of a dangerous and deadly weapon and for the commission of that felony violates the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States, where the highest court of that state has held the state legislature intended to separately punish both offenses but that the two offenses are in law and fact the same offense?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States, in pertinent part, reads as follows:

"No person shall. . .be subject for the same offense to be twice put in jeopardy of life or limb. . . ."

The statutes defining the underlying felony, armed robbery, Mo.Rev.Stat.Secs. 560.120 (1969) and 560.135 (Supp. 1975), and the armed criminal action statute, Mo.Rev.Stat.Sec. 559.225 (Supp. 1976), have been reproduced by the Missouri Supreme Court in its opinions in State v. Sours, 593 S.W.2d 208, 213-14 (Mo.Banc 1980) and 603 S.W.2d 592, 597-98, n. 5 and 6 (Mo.Banc 1980), both of which figure prominently in this case. The Petitioner has also reproduced these statutes in its Appendix B to the petition.

Mo.Rev.Stat.Sec. 556.041 (1978), effective January 1, 1979, provides as follows:

"When the same conduct of a person may establish the commission of more than one offense he may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if

(1) One offense is included in the other, as defined in section 556.046; or

(2) Inconsistent findings of fact are required to establish the commission of the offenses; or

(3) The offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or

(4) The offense is defined as a continuing course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses."

Mo.Rev.Stat.Sec. 556.046 (1978), effective January 1, 1979, provides as follows:

"1. A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when

(1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(2) It is specifically denominated by statute as a lesser degree of the offense charged; or

(3) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein.

2. The Court shall not be obligated to charge the jury with respect to an included offense unless there is a basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense."

STATEMENT OF THE CASE

The indictment, filed in the state trial court on November 21, 1979, was in eight counts. The odd-numbered counts alleged the Respondent Kendrick had committed four armed robbery offenses and the even-numbered counts alleged that he had in addition committed four armed criminal action offenses, each of the latter offenses referring to the armed robbery described in the previous count. On December 19, 1979, the Respondent was brought to trial on Counts V and VI, the former an armed robbery charge for the robbery of the Safeway Store at 4th and Gray in Joplin, Missouri, on November 22, 1977, and the latter for armed criminal action relating the same armed robbery. The trial was completed that day when the jury returned its verdicts finding the Respondent guilty of armed robbery and assessing punishment at thirty years and finding him guilty of armed criminal action and assessing punishment at life. On January 2, 1980, the Respondent was sentenced in accordance with these verdicts, the sentences running concurrently.

On that same date, January 2, 1980, the Respondent pled guilty to the three charges of armed robbery contained in Counts I, III and VII and was sentenced to thirty years on each count. After the pleas of guilty on these counts were accepted, with regard to Counts II, IV and VIII, all derivative armed criminal action charges, the Respondent waived trial by jury and stipulated that he was guilty of the robbery charges in Counts I, III and VII and that he had committed those robberies with or through the use, assistance or aid of a dangerous and deadly weapon. Whereupon, the Respondent was found guilty by the trial court of armed criminal action as alleged in Counts II, IV and VIII. The Respondent was then given three life sentences on those counts. All eight sentences were made to run concurrently.

On appeal, the Missouri Supreme Court reversed all four armed criminal action convictions relying upon its opinions in the Sours cases. 606 S.W.2d at 644.

Thereafter, on or about December 15, 1980, the State filed its petition for writ of certiorari. Eventually, this Court granted the writ, vacated the judgment and remanded the case to the Missouri Court for further consideration in light of Albernaz v. United States, 450 U.S. ____ (1981). After the Missouri Court completed its re-examination, State v. Kendrick, 619 S.W.2d 61 (Mo.Banc 1981), the Petitioner again sought certiorari to this Court.

REASONS FOR DENYING THE WRIT

1. This case does not present a double jeopardy issue in a manner that warrants the exercise of the certiorari jurisdiction of this Court.

The armed criminal action statute which lies at the very heart of any controversy in this case was renumbered Mo.Rev.Stat.Sec. 571.015 (1978) at the time of the enactment of the new Missouri Criminal Code which was effective on January 1, 1979. Enacted with that code were two new statutes, Mo.Rev.Stat.Secs. 556.041 and .046 (1978), the combined effect of which is to preclude multiple convictions, and consequently multiple punishments, where one offense is included in or a lesser included offense of another. One of the material issues decided by the Missouri Supreme Court in the combined Sours v. State cases (Sours v. State, 593 S.W.2d 208 (Mo.Banc 1980), vacated sub nom., Missouri v. Sours, 446 U.S. 962 (1980); and Sours v. State, 603 S.W.2d 592 (Mo.Banc 1980), cert. denied sub. nom., Missouri v. Sours, 67 L.Ed.2d 118 (1981)) was that it was the intent of the Missouri General Assembly, the term used to describe the combined houses, Senate and Legislature, of the legislative branch of the State, to punish separately armed criminal action and the underlying felony. However, that Court in the Sours cases

also decided that the underlying felony was either an included or lesser included offense of armed criminal action. The Missouri Supreme Court built on these constructions of State law in State ex rel. Westfall v. Ruddy, supra, to hold that Sections 556.041 and .046 preclude multiple convictions and punishments for both armed criminal action and the underlying felony. Prosecutions under the armed criminal action statute for offenses occurring after the effective date of the new Code, January 1, 1979, will not present any double jeopardy issue under the Fifth Amendment. Under these circumstances, this case does not present an issue in a manner that warrants the exercise of certiorari jurisdiction by this Court. Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972).

2. The Double Jeopardy Clause of the Fifth Amendment prohibits imposing separate punishments for two offenses which are in law and fact the same offense even though the punishments are imposed as a result of a single proceeding and even though the legislative intent was that a separate punishment be imposed.

The petition for writ of certiorari filed by the State questions the validity of reversing the Respondent's convictions on the even-numbered counts in this case on federal constitutional double jeopardy grounds. It is clear, however, from the facts of the case that regardless of the reasoning, the State Supreme Court was correct in reversing the convictions on Counts II, IV and VIII. The Respondent had previously been convicted of the corresponding armed robberies in Counts I, III and VII by pleading guilty to those counts. Thereafter he was court-tried on Counts II, IV and VIII on the basis of a stipulation. Therefore, there clearly were two proceedings involved with regard to those six counts and therefore the convictions on the even-numbered counts cannot stand. Harris v. Oklahoma, 433 U.S. 682 (1977). The question therefore is whether it was a violation of the Fifth Amendment Double Jeopardy Provision to convict the Respondent of Counts V and VI.

In this case with regard to Counts V and VI, there was a single proceeding as a result of which the Respondent received multiple punishments for armed robbery and armed criminal action, the two offenses arising out of but one incident or transaction. The Missouri Supreme Court has definitively decided two issues in the Sours cases which this Court may not disturb:

1. It was the intent of the Missouri General Assembly that separate and multiple punishments be imposed for armed criminal action and the underlying felony.

2. Every element of the underlying felony is included in armed criminal action; that is, proof of the underlying felony does not require proof of any additional fact not needed to prove armed criminal action; that is, armed criminal action includes the underlying felony; that is, armed criminal action and the underlying felony are in law and fact the same; and that is, armed criminal action is the "same offense" as the underlying felony for double jeopardy purposes. E.g., Whalen v. United States, 445 U.S. ____ (1980); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1973); O'Brien v. Skinner, 414 U.S.524 (1973); Eastlake v. Forrest City Enterprises, Inc., 426 U.S. 668 (1976); Garner v. Louisiana, 368 U.S. 157 (1961); Albernaz v. United States, 450 U.S. ____ (1981).

Assuming that the Respondent has adequately stated the two fundamental issues of state law decided by the Missouri Supreme Court in the combined Sours cases, the phraseology used by the Petitioner in stating its version of the "questions presented" here and much of the argument for granting the writ is confusing. The constitutional issue is not one involving multiple "convictions" but one involving multiple "punishments." It is true that, after holding that the Respondent could not be punished for both armed robbery and armed criminal action, the Missouri Supreme Court vacated and set aside the "convictions" for armed criminal action. However, in this State there can be no "conviction" unless there is an imposition of a sentence of punishment. See State v. Frey, 459 S.W.2d 359 (Mo. 1970); State v. Crate, 493 S.W.2d 1 (Mo.Ct.App. at St.L. 1973).

At any rate, the emphasis the Petitioner puts on "convictions" in presenting the questions in the case and arguing the case is unwarranted. The case insofar as Counts V and VI are concerned involves a question of the reach of the Fifth Amendment's guarantee against multiple punishments for the same offense. The framework in which the question must be decided is as follows: (1) the punishments result from offenses which arose out of the same act, incident or transaction; (2) it was the legislature's intent to punish each offense separately; (3) there was but one legal proceeding; and (4) the offenses are in law and fact the same offense. Thus, the constitutional question in that framework is whether the multiple punishments imposed for the two but same offenses violate the guarantee against multiple punishments contained in the Double Jeopardy Clause of the Fifth Amendment.

The Petitioner claims that this Court has given a definitive answer to this question in the Albernaz and Whalen cases and because of the dismissal for want of a substantial federal question in Brinkley v. Michigan, _____ U.S. _____ (1979). In Albernaz, however, the Court found the two offenses were not in law and fact the same. The decision in Whalen is clearly based upon a finding of legislative intent and does not measure the reach of the constitutional protection against multiple punishments. The case underlying Brinkley is cited as Wayne County Prosecutor v. Recorder's Court Judge, 406 Mich. 374, 280 N.W.2d 794 (1979). In the latter case, the Michigan Supreme Court was construing a felony firearms statute and the underlying felony, in Brinkley's case armed robbery. In essence, at least as is important here, the Michigan court held the felony firearms statute created a separate and distinct crime from the underlying felony so that the two offenses werenot the same. As the Respondent perceives it, this holding by the Michigan court on a question of state law was conclusive on the issue of whether the two offenses were the same for double jeopardy purposes and therefore this Court, not being free to place a contrary construction on state statutes, could find no substantial federal question.

In sum, it appears this Court has not definitively addressed the multiple punishments-double jeopardy question in this case. With regard to this question, the Missouri Supreme Court has fully reviewed and considered the opinions of this Court. Sours v. State, supra, 593 S.W.2d at 211-14, 218-21; Sours v. State, supra, 603 S.W.2d at 603-606; and State v. Haggard, 619 S.W.2d 44, 49-51 (Mo.Banc 1981). Citations to prior opinions of this Court are contained in the thorough analysis of the Missouri court. The Respondent can neither improve on nor add to the analysis of the constitutional question made by the Missouri court. In sum, the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States prohibits Missouri from punishing the Respondent twice for the same offense. In the framework of this case, armed robbery (Count V) and armed criminal action (Count VI) are the same offense. Therefore, the Respondent may not be punished for both offenses.

The Missouri Supreme Court has declined to make any ruling which would free the Missouri General Assembly to "impose separate punishments for two crimes that constitute the same offense under the traditional same evidence test."

> "We believe that such a ruling would abolish the traditional double jeopardy protection against multiple punishments for the same offense. It would require bifurcation of the meaning of 'same offense' under the double jeopardy clause. It would grant the state legislature the power to define the meaning of 'same offense' as used in the double jeopardy clause of the Constitution, a traditional judicial function. The implicit effect of such a holding would be that the double jeopardy clause would hereafter be only a limitation on the executive and judicial branches, but not on the legislative branch of government. We do not believe that it is appropriate for this Court to make such a ruling. If such a ruling is to be made, it is the responsibility of the United States Supreme Court to make it."

Sours v. State, supra, 603 S.W.2d at 606.

In fact, if the issue of whether multiple punishments for the same offense can be imposed is reduced to an issue of legislative intent, it may no longer be said that there are three separate constitutional protections in the guarantee against double jeopardy. There would never be need to invoke the third protection, the protection against multiple

punishments for the same offense. See, e.g., North Carolina v. Pearce, 395 U.S.711 (1969); United States v. DiFrancesco, 66 L.Ed.2d 328 (1980).

At this point, the Court must apply the Double Jeopardy Clause to the framework as previously set forth to determine whether the Missouri Court correctly perceived a violation of federal constitutional law. It appears that in doing so, the Court will have to consider the Blockburger test. Blockburger v. United States, 284 U.S. 299 (1932). As analyzed by the Missouri Supreme Court in the Sours cases, that test has been used by this Court in the past to prevent the imposition of multiple punishments for offenses which arose out of the same transaction and which were in law and fact the same offense. In the Whalen case, the rule was transformed into one of statutory construction which apparently found application only in determining Congressional or legislative intent. If, after applying the rule or test, it is found that the offenses are the same, it is to be presumed that the Congress or the legislature did not intend that multiple punishments be imposed. Thus, as a statutory rule of construction, the Blockburger test is useful only in determining legislative intent. As such, that rule finds no application here. The intent of the Missouri General Assembly has been decided conclusively for this Court by the Missouri Supreme Court. The intent was to impose multiple punishments.

In opposition to that intent stands the double jeopardy guarantee against the imposition of multiple punishments. In opposition to that intent is further application of the Blockburger test or rule. In Albernaz v. United States, supra, 67 L.Ed.2d at 285 (footnote 3), the rule took on a dual character: In addition to its place as a rule of statutory construction, the rule was restored to its position of determining whether two offenses are the same for double jeopardy purposes. In applying the rule to make the constitutional determination, the framework as previously set forth for the reasons previously stated controls. Because of the definitive construction placed on state statutes by the Missouri Supreme Court, this Court is not free to find that the underlying felony requires proof of a fact which armed criminal

action does not. The Blockburger test, when applied not as a rule of statutory construction but as a rule of constitutional law, mandates the conclusion that a Missouri defendant may not be punished for committing both the underlying felony and armed criminal action.

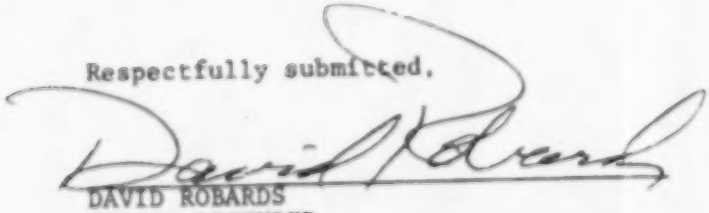
Because there was only one criminal proceeding on Counts V and VI in this case, one of the primary objectives of the double jeopardy guarantee - that of prohibiting a second proceeding - is not involved. Surely prohibiting multiple punishments for the same offense is another basic thrust or purpose of that guarantee. Surely, "the prosecution may not do in one trial what is prohibited from doing in two trials." Elmore v. State, 382 N.E.2d 893, 894-95 (Ind. 1978). Here, the State could not convict and punish the Respondent for one of the two offenses (Counts V and VI) at one criminal proceeding and then convict and punish him for the second of the two offenses at the second criminal proceeding. Harris v. Oklahoma, supra. If the State were to be allowed to do in one proceeding what the State may not do in two proceedings, form would be clearly be exalted over substance. It is said that in this area of constitutional law, the "exaltation of form over substance is to be avoided." United States v. DiFrancesco, supra, 66 L.Ed.2d at 349.

So let it be.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,



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(417) 781-4114

ATTORNEY FOR RESPONDENT

I hereby certify that a true and correct copy of the foregoing was mailed postage prepaid this 6th day of November, 1981, to Mr. Philip M. Koppe, Assistant Attorney General, and Mr. Steven W. Garrett, Assistant Attorney General, P. O. Box 899, Jefferson City, Missouri 65102.

Sandy McVay

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI, Petitioner,	)	
vs.	)	No. 81-625
ROBERT LEE HAGGARD, Respondent.	)	

RESPONDENT TOMMY BRYANTKENDRICK'S MOTION AND SUGGESTIONS FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, TOMMY BRYANT KENDRICK, by counsel, hereby moves the Court for its order allowing the Respondent to proceed in this case in forma pauperis.

As grounds for this motion, the Respondent states as follows:

1. On or about September 24, 1981, a petition for writ of certiorari, including a case involving the Respondent, was docketed in the above case and assigned the above number.

The last information received by the undersigned counsel was that the Respondent Kendrick was incarcerated in a penal institution in the State of Kansas, completing service of a sentence imposed on him in that state, with detainers filed on him by California and Missouri for convictions in those states.

2. On best information and belief, the Respondent is unable to pay the costs and expenses required or necessitated in responding to the petition for writ of certiorari and any other subsequent proceedings.

3. The Respondent was determined to be an indigent by the courts of the State of Missouri and was appointed counsel to represent him and allow to proceed in forma pauperis in connection with all proceedings before the courts of that state. The Respondent was also allowed to proceed in forma pauperis by this Court in Missouri v. Kendrick, No. 80-997.

4. On best information and belief and from personal observation, the Respondent is not learned in the law and is unable to personally prepare a response to the petition for writ of certiorari or to represent himself in any subsequent proceedings.

5. The undersigned is attempting to obtain an affidavit of poverty from the Respondent to file in support of this motion and if the undersigned is able to obtain such an affidavit will immediately forward it to this court.

WHEREFORE, the Respondent prays that the Court allow him to proceed in forma pauperis and to grant him such other relief as is deemed necessary and proper.

Respectfully submitted,

David Robards

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PUBLIC DEFENDER

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ATTORNEY FOR RESPONDENT

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 6th day of November, 1981, to Kris Green, Assistant Attorney General, P. O. Box 899, Jefferson City, Missouri 65102.

Sandy McNew

AFFIDAVIT

I, David Robards, upon my oath, hereby state as follows:

1. I am the duly appointed public defender for the 29th Judicial Circuit of Missouri which is coextensive with the boundaries of the County of Jasper, Missouri.

2. My office was appointed to represent the Respondent during all proceedings before the courts of the State of Missouri after the Respondent was found to be unable to afford counsel or pay other costs and expenses.

3. On best information and belief and from personal observation, the Respondent is not learned in the law and is unable to represent himself in connection with this case.

4. On best information and belief, the Respondent is presently incarcerated in a state institution either in Kansas, California or Missouri.

These things are true and correct and further the affiant saith not.

David Robards

DAVID ROBARDS

Subscribed and sworn to before me this 6th day of November, 1981.

Notary Public

My commission expires: 4-1-1983.

Opposition

10

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

STATE OF MISSOURI,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 81-625
	)	
ROBERT LOWERY,	)	
	)	
Respondent.	)	

STATEMENT OF ROBERT LOWERY

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818 Olive Street, Suite 873
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314/436-7715
Attorney for Robert Lowery

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

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SUPREME COURT, U.S.

STATE OF MISSOURI,
Petitioner,
vs.
ROBERT LOWERY,
Respondent.

No. 81-625

RESPONDENT ROBERT LOWERY'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent Robert Lowery incorporates his previously filed affidavit as to his complete absence of funds and has been and is still incarcerated without income or assets.

WHEREFORE, said respondent prays for leave of this Court to proceed in forma pauperis.

Respectfully submitted,

LAWRENCE O. WILLBRAND, P.C. #15068
Attorney for Robert Lowery

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

STATE OF MISSOURI,
Petitioner,
vs.
ROBERT LOWERY,
RESPONDENT.

No. 81-625

MEMORANDUM IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

Section 559.225 R.S.Mo. Supp. 1976, as known as the armed criminal statute has been applied as effective by the Missouri Courts but where the Missouri Courts have confronted a factual situation wherein the predatory act includes the act of being armed as an essential element, the Missouri Courts have the reasoning that there cannot be duplicity of punishment for the same act.

The Missouri Legislature was attempting to enhance punishment with the use of the statute in question where a dangerous weapon was employed in the commission of a crime.

Where a crime includes by definition the use of a dangerous weapon, the legislature has already taken into consideration the fact that such a weapon was employed and hence punishment for that act has simply been previously evaluated and included in the punishment assessed.

Compelling logic dictates that the Missouri Courts are correctly refusing to be indiscriminate in applying that statute.

Robbery in a manner other than with the use of a dangerous weapon is a crime and punishable as such.

Armed Robbery is also a crime for which there is even greater punishment.

To add even further increased punishment to armed robbery by use of the statute in question would enter the realm of something less than good legal theory and set a precedent hard to explain.

As argued by the petitioner one may be sentenced for armed criminal action and suffer an enhancement of that punishment because he was armed when he did so.

Robert Lowery was convicted and sentenced for armed robbery.

Should the court then assess punishment for armed robbery to the full extent of the law under the circumstances and then feel compelled to assess further punishment under the statute in question because he was armed?

It would be a simple matter for the legislature to increase the original punishment for armed robbery itself if it had such an intent.

This issue should be put to rest by this Court by denying certiorari.

Respectfully submitted,

LAWRENCE O. WILLBRAND, M.O. #15068
Attorney for Robert Lowery

Opposition

11

RECEIVED
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No. 81-625

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF MISSOURI,
Petitioner,

v.

ROBERT LEE HAGGARD,
Respondent,

(listed on first page are twenty-two cases also joined in this petition as per Rule 19.4)

STATEMENT OF EDWARD H. PENNINGTON, JR.,

LAMAR WILLIAN DYE, #12116
906 Grand, Suite 900
Kansas City, MO 64106
816/842-2566
Attorney for Edward H. Pennington

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STATEMENT OF EDWARD H.PENNINGTON, JR.

Respondent Edward H. Pennington, Jr. agrees with, incorporates by reference, and adopts the reasoning contained in the Brief in Opposition to the Writ submitted by Respondent Rollan Anthony Williams through his counsel Michael J. Gorla. A copy of which is attached as Respondent Edward H. Pennington Jr..'s Exhibit 1.

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Attorney for Edward H. Pennington, J

STATE OF MISSOURI,
Petitioner,
v.
DONALD L. COLLINS,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
STANLEY G. HELTON,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
RANDY LEE SINCLAIR,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
TIMOTHY CREWS,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
WILLIE TUNSTALL,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
TERRY GENE CREWS,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
ROBERT LOWERY,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
ROLLAN ANTHONY WILLIAMS,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
TOMMY BRYANT KENDRICK,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
JOHNNY WILLIAMS,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
WALLACE D. COUNSELMAN, JR.,
Respondent,

STATE OF MISSOURI
Petitioner,
v.
BOBBY JOE McGEE,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
MICHAEL L. WHITE,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
MARION PAYNE,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
ROLLAN ANTHONY WILLIAMS
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
WILLIAM BROWN,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
JACKIE MARTIN,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
EDDIE GREER,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
HAROLD HAWKINS,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
CARL FLETCHER,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
HANSFORD GASKIN,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
EDWARD H. PENNINGTON, JR.,

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THE REASONS FOR DENYING THE WRIT

Petitioner contends that the Missouri Supreme Court's decision in Sours v. State, 603 S.W.2d 592 (Mo. banc 1980), which was affirmed in State v. Haggard, 619 S.W.2d 44 (Mo. banc 1981), conflicts with the applicable decisions of this Court including the recent decisions in Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), and Albernaz v. United States, 450 U.S. , 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). Respondent Williams respectfully disagrees and submits that a writ of certiorari should not issue to review the judgment of the Missouri Supreme Court.

In Whalen, supra, the District of Columbia Court of Appeals affirmed the consecutive sentences imposed in a single prosecution for the offense of rape and the offense of felony murder, the killing committed in perpetration of the rape. This Court reversed on the finding that Congress had not authorized consecutive sentences for the two offenses, and thus the trial court had exceeded its authority.

Contrary to the State of Missouri's argument in its petition for certiorari, the majority opinion in Whalen did not conclude that a defendant can be punished in one proceeding for two crimes if the legislature so intends where both offenses are considered the same offense under the test articulated in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Petitioner bases its interpretation of Whalen on language contained in the concurring and dissenting opinions. It appears that such a view may be held by the Chief Justice, Justices White, Rehnquist and Blackman, but the fact is the majority in Whalen made it clear that it was basing its decision on statutory interpretation and not on constitutional grounds. Since this Court found that Congress did not intend to punish a defendant both for rape and the killing committed in the perpetration of said rape, the Whalen case was disposed of without resort to the application of the double jeopardy clause of the Fifth Amendment.

The Missouri Supreme Court correctly interpreted and applied Whalen in Sours v. State, 603 S.W.2d 592 (Mo. banc 1980). After examining the legislative intent behind the armed criminal action statute, §559.225 RSMo. Supp. 1976, and applying every possible test and standard available for statutory construction, the Missouri Supreme Court concluded that the "General Assembly did clearly intend to impose two punishments for armed criminal action and the lesser included offense." Sours v. State, supra, 603 S.W.2d at 603. The statutory interpretation which was dipositive of the issue in Whalen does not solve the problem in Sours.

Likewise, the case of Albernaz v. United States, supra, does not mandate that the Missouri Supreme Court change its decision in Sours v. State, supra. In Albernaz, this Court addressed the issue of whether the double jeopardy clause of the Fifth Amendment was violated by the imposition of consecutive sentences for the offenses of conspiracy to import marijuana, and conspiracy to distribute marijuana. Applying the Blockburger test, this Court concluded that there was not a double jeopardy-multiple punishment problem since each offense requires proof of a fact which the other did not, and thus, said offenses are separate and distinct. Countary to the view adherred to by the petitioner, the Albernaz decision was not based on the conclusion that when the legislature so intends, multiple punishment can constitutionally be imposed for two offenses in spite of the fact that said offenses are considered the same offense under the Blockburger test. Since the offenses of armed criminal action and its predicate felony are the same offense under Blockburger v. United States, supra, this Court's decision in Albernaz is not applicable to the Missouri Supreme Court's decision in Sours v. State, supra.

Petitioner also contends that the Sours and Haggard decisions conflict with this Court's summary dismissal in Brintley v. Michigan, 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979). As set out in the State of Missouri's petition at page 8, the following question was sought to be presented in Brintley:

"Does double jeopardy clause prohibit separate convictions and sentences for violation of state statute, §750.227(b), proscribing possession of firearm during commission of felony and for underlying felony (armed robbery in one case and second degree murder in another), where all proofs required to establish violation of underlying felony are necessarily required for proof of violation of §750.227(b) where there is no evidence that weapon has been possessed for any other purpose than the commission of underlying felony, where underlying felony is specifically charged as a felony element of firearms possession charge, and where (in armed robbery case) state has already augumented punishment for armed robberies above punishment imposed for unarmed robberies. 26 Crim.L.Rep. 4113 §750.227(b), M.C.L.A. appears in Appendix D of State's Petition).

What is not pointed out in the petition for certiorari is that in Wayne County Prosecutor v. Recorder's Court Judge, 406 Mich. 374, 280 N.W.2d 794 (1979), one of the cases consolidated in Brintley, the Michigan Supreme Court determined that the Michigan felony firearms statute and the underlying felony were distinct and separate offenses. This Court is bound by the construction of a state statute by the highest court of a state, Memorial Hospital v. Maricopa County, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1973), and thus, this Court's dismissal for no substantial federal question in Brintley was warranted by the Michigan Supreme Court's finding that the felony firearms statute and the underlying felony are not the same offense. As stated earlier herein, the Missouri Supreme Court in Sours v. State, supra, has determined that armed criminal action, and the underlying felony are the same offense, and so, this Court's summary dismissal in Brintley is inapplicable to the situation in Missouri.

Finally, petitioner contends that Sours and Haggard conflict with the decisions of this Court interpreting the meaning and scope of the double jeopardy clause of the U.S. Constitution. The Missouri Supreme Court has set out a complete and thorough analysis of the law in this area, and its analysis correctly interprets and applies the decision of this Court. Sours v. State, supra, 603 S.W.2d at 604-606. Said analysis emphasizes that this Court has consistently stated that the double jeopardy clause of the U.S. Constitution serves three purposes. First, it protects against a second prosecution for the same offense after an acquittal. Second, it protects against a second prosecution for the same offense after a conviction. Third, it protects against multiple punishment for the same offense.

North Carolina v. Pearce, 395 U.S. 711 89 S.Ct. 2072, 23 L.Ed.2d 656; Brown v. Ohio, 432 U.S. 161 97 S.Ct. 2221, 53 L.Ed.2d 168 (1977); Harris v. Oklahoma, 443 U.S. 682 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977); Illinois v. Vitale, 447 U.S. 410, 100 S.Ct. 2260 65 L.Ed.2d 2228 (1980).

While petitioner contends that the above authorities only apply in situations involving successive prosecutions and that the legislature can authorize punishment in a single proceeding for both an offense and a lesser included offense, such is not correct. While the first two purposes of double jeopardy deal with the problem of successive prosecutions, the third purpose does not. In fact, if the multiple punishment protection dealt only with sucessive prosecutions, then the third purpose would be nothing more than a restatement of the other two. The protection against multiple punishment for the same offense would be rendered useless were the state able to do in one prosecution what it cannot do in two prosecutions. Regarding the petitioner's contention that the legislature can constitutionally authorize punishment for both an offense and a lesser included offense, if that were true, the protection against multiple punishment, which was recently cited with approval in Illinois v. Vitale, supra, would become a nullity.

As stated earlier, the Missouri Supreme Court has decided that armed criminal action §559.225 RSMo. Supp. 1976, and the underlying felony are the same offense, and that the Missouri legislature has intended to separately punish both offenses. This court is bound by the Missouri Supreme Court's interpretation of Missouri statutes. Memorial Hospital v. Maricopa County, supra. Therefore, applying the teachings of this Court, to prosecute and convict a defendant of both armed criminal action and the underlying felony constitutes multiple punishment for the same offense in violation of the double jeopardy clause of the Fifth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, respondent submits that petitioner's writ of certiorari be denied.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was mailed, postage prepaid, this 24 day of February, 1982, to:

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Opposition

12

No. 81-625

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

RECEIVED
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SUPREME COURT, U.S.

STATE OF MISSOURI,
Petitioner

v.

Randy Sinclair,
Respondent,

(and twenty-two cases also joined in this petition per Rule 19.4).

On Petition for Writ of Certiorari to the Supreme Court of Missouri.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

RANDY LEE SINCLAIR
IN PROPRIA PERSONA
BOX 900
JEFFERSON CITY, MISSOURI
65102

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On Petition for Writ of Certiorari to the Supreme Court of Missouri.

RESPONDENT'S BRIEF IN OPPOSITION TO
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Opinions Below

This list updates in part the list contained in the Petition for Certiorari.

State of Missouri v. Sinclair, 606 S.W.2d 271 (Mo. banc 1981);

State of Missouri v. Terry Gene Crews, 607 S.W.2d 729 (Mo. banc 1981);

State of Missouri v. Brown, 607 S.W.2d 801 (Mo. banc 1981);

State of Missouri v. Greer, 609 S.W.2d 423 (Mo. banc 1981);

State of Missouri v. Williams, 610 S.W.2d 644 (Mo. banc 1981);

Constitutional and Statutory Provisions Involved

Respondents add to the statutory provisions cited by petitioner the following.

Section 556.041(1), R.S.Mo. 1978, reads in relevant part:

> Section 556.041. Limitations on conviction for multiple offenses. -- When the same conduct of a person may establish the commission of more than one offense he may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if
>
> (1) One offense is included in the other, as defined in section 556.046;

Section 556.046.1(1), R.S.Mo. 1978, reads in relevant part:

> 556.046. Conviction of included offenses. —
> 1. A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when
>
> (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged;

Summary of Argument

I

The decision of the Missouri Supreme Court does not conflict with applicable decisions of this Court because this Court has not decided the issue presented here.

II

The federal constitutional issue involved has been nullified by subsequent enactments of the Missouri General Assembly and by construction of those enactments by the Missouri Supreme Court.

Argument

I

Petitioner contends that the decision of the Missouri Supreme Court in State v. Sinclair, 606 S.W.2d 271 (Mo. banc 1981), holding that Missouri's armed criminal action statute, Section 559.225, R.S.Mo. Supp. 1976, violates the double jeopardy clause of the United States Constitution, Amendment V, conflicts with decisions of this Court. Principal reliance is Placed on Albernaz v. United States, 450 U.S. _____, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). The separate offenses of which Albernaz was convicted satisfied the test of ~~Blockburger~~ Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), each requiring proof of a fact the other did not. Albernaz does not govern the situation presented in these cases of

simultaneous conviction for armed criminal action and the underlying felony necessary to be proved under the Missouri armed criminal action statute.

Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977), although distinguishable to the extent that it involved multiple prosecutions, stands for the proposition that when a greater crime (in Harris, felony-murder) cannot be proved without proof of a lesser crime (the underlying felony), the two are the same offense for double jeopardy purposes.

In Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), it was decided that the Congressional intent was not to authorize consecutive sentences for felony-murder and the underlying felony of rape. Whalen did not reach the issue of whether Congress could constitutionally have authorized consecutive sentences.

Petitioner, in his "Questions Presented," cites Brintley v. Michigan, 444 U.S. 948, 100 S.Ct. 418, 62 L. Ed.2d 317 (1979). This makes too much of a memorandum decision dismissing the appeal for want of a substantial federal question. Such a decision breaks no new ground, but applies only to the "precise issues" and "particular facts" involved in the judgment appealed from. Mandel v. Bradley, 432 U.S. 173, 176, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977). It intimates nothing with regard to Missouri Law.

II

The issue on which petitioner seeks review is not "an important question of federal law which has not been, but should be, settled by this court . . ." Supreme Court Rule 17.1(c). It has, in fact, been rendered moot by subsequent enactments of the Missouri General Assembly.

In 1977, the legislature enacted a new Criminal Code, Section 556.011 et seq., R.S.Mo. 1978, effective January 1, 1979. Two provisions of that Code are pertinent here. Section 556.041 forbids conviction of more than one offense arising out

of the same conduct if "(1) One offense is included in the other, as defined in section 556.046." The latter provides in relevant part:

> 1. A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; . . .

The Missouri Supreme Court has recently considered the impact of these provisions on the armed criminal action statute, now Section 571.015, R.S.Mo. 1978, reenacted as part of the same Criminal Code. In State ex rel. Westfall v. Ruddy, _____ S.W.2d _____, No. 61958 (Mo. banc 1981), the court held that conviction of both armed criminal action and the underlying felony was forbidden by the above-cited statutes. The prosecution henceforward may charge an accused with both offenses and may submit both to the jury, but only in the alternative.

With Ruddy, the federal double jeopardy issue has been rendered moot. Since this Court does not review a state supreme court's construction of a state statute, Memorial Hospital v. Maricopa County, 415 U.S. 250, 256, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974), a grant of certiorari would serve no purpose.

Respondent submits that the federal question in these cases is untimely presented and of no such significance as to merit review on writ of certiorari.

Conclusion

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

Randy L. Sinclair

Randy L. Sinclair
IN PROPRIA PERSONA
BOX900
JEFFERSON CITY, MISSOURI
65102

No. 81-625

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1981

STATE OF MISSOURI,
Petitioner

v.

RANDY LEE SINCLAIR,
Respondent,

(and twenty-two cases also joined in this petition per Rule 19.4).

PROOF OF MAILING & AFFIDAVIT

I, Randy L. Sinclair, in forma pauperis per se, hereby certify that the enclosed Brief in Opposition to Petition for Certiorari was placed in a mailbox in this penitentiary Box 900 Jefferson City, Missouri 65102 first class postage prepaid, on January 18, 1982, addressed to the Clerk of the Supreme Court, 1 First St., N.E., Washington, D.C. 20543, within the quickest time possible due to when I received the stuff informing me that I had to file this Brief in Opposition to Petition for Writ of Certiorari and that a copy was mailed at the same time and place to Philip M. Koppe and Steven Garrett, Assistant Attorneys General, P.O. Box 899, Jefferson City, Mo. 65102.

Randy L. Sinclair
RANDY L. SINCLAIR
IN PROPRIA PERSONA
BOX 900
JEFFERSON CITY, MISSOURI
65102

Subscribed and sworn to before me this ____ day

of JAN 18 1982, 1982.

Robert A Forman
Notary Public

ROBERT A. FORBMAN
NOTARY PUBLIC STATE OF MISSOURI
MY COMMISSION EXPIRES AUGUST 1, 1984

My commission expires: _____

IN THE SUPREME COURT OF THE UNITED STATES

RANDY SINCLAIR Petitioner

V.

STATE OF MISSOURI Respondent

RECEIVED
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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Randy Sinclair, asks leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has previously been granted leave to so proceed in both the U.S. District Court and U.S. Court of Appeals. Petitioner's affidavit in support of this motion is attached hereto.

/s/ Randy L. Sinclair

AFFIDAVIT

I, Randy Sinclair, being first duly sworn according to law, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable topay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed?

   Answer: No, last employment was back in March of 1979 at Wright's Litho & Printing - 219 E. Commerical - Springfield, Missouri 65803. Salary at $3.00 's an hour and about 500's dollar's Monthly.

2. Have you received within the past twelve months any income from a business, profession or other form of self- employment, or in the form of rent payments, interest, dividends or other source?

   Answer: Yes, got $5.00's from State for Xmas and $7.00's & $ .50¢ for one month of work in Inmates Dining Room. But I already had it spended before I received this legal stuff in the mail.

3. Do you own any cash or checking or savings account?

   Answer: No.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

   Answer: No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

   Answer: None, or nobody is dependent on me whatsoever and therefore there is no list to present.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalities for perjury.

/s/ Randy L. Sinclair

Subscribed and Sworn to Before me this JAN 18 1982 day of _____, 19 ___.

ROBERT A. FOREMAN
NOTARY PUBLIC STATE OF MISSOURI
MY COMMISSION EXPIRES AUGUST 1, 1984

Robert A. Foreman

Opposition

13

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IN THE

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OCTOBER TERM, 1980

STATE OF MISSOURI,

Petitioner,

Vs.

JOHNNY WILLIAMS, ET AL.,

Respondents.

BRIEF IN OPPOSITION
TO GRANTING PETITION FOR WRIT OF CERTIORARI

Leonard W. Buckley, Jr.
1215 Pine Street
St. Louis, Missouri 63103
314/421-1008

Attorney for Respondent
Johnny Williams

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Gore v. United States, 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed. 2d 1405 (1968);

Henry v. Rock Hill, 378 U.S. 776, 84 S.Ct. 1042, 12 L.Ed. 2d 79 (1964);

Iannelli v. United States, 429 U.S. 770, 95 S.Ct. 1284, 43 L.Ed. 2d 616 (1975);

Jankovich v. Indiana Toll Road Company, 379 U.S. 487, 95 S.Ct. 493, 13 L.Ed. 2d 439 (1965);

Mandel v. Bradley, 432 U.S. 173, 97 S.Ct. 2238, 53 L.Ed. 2d 199 (1977);

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Minnesota National Tea Company, 309 U.S. 551, 60 S.Ct. 676, 84 L.Ed. 928 (1940);

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Ohio v. Gallagher, 425 U.S. 257, 96 S.Ct. 1438, 43 L.Ed. 2d 722 (1976);

Simpson v. United States, 435 U.S. 1 (1978);

Sours v. State, 503 S.W. 2d 592 (Mo. en banc 1980);

State v. Haggard, 619 S.W. 2d 44 (Mo. en banc 1981);

State v. Johnny Williams, ____S.W. 2d _____;

United State v. Thirty-Seven (37) Photographs, 402 U.S. 363, 28 L.Ed. 2d 822, rehearing denied 403 U.S. 924, 91 S.Ct. 2221, 29 L.Ed. 2d 702 (1971);

Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed. 2d 715 (1980);

Wilson v. Cook, 427 U.S. 474, 66 S.Ct. 663, 90 L.Ed. 793 (1943);

Zacchini v. Scripp-Howard Broadcasting Company, 433 U.S. 562 (1977).

STATUTES CITED

Mo. Rev. Stat. §559.135

Number 81-625

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF MISSOURI,

Petitioner,

Vs.

JOHNNY WILLIAMS, ET AL.,

Respondents.

BRIEF IN OPPOSITION

TO GRANTING PETITION FOR WRIT OF CERTIORARI

The Respondent, JOHNNY WILLIAMS, in opposition to the granting of the Petition for Writ of Certiorari in this case, states as follows:

QUESTION PRESENTED

Whether the Writ of Certiorari should not issue because this Court lacks jurisdiction to review the decision issued by the Supreme Court of Missouri in that the ruling was based upon the authority of Sours v. State, 593 S.W. 2d 208 (Mo. banc 1980) a ruling which was based both upon federal and independent state grounds, and the decision of the Court in State v. Haggard, 619 S.W. 2d 44 (Mo. en banc 1980) does not change the State of Missouri law.

REASON FOR DENYING THE WRIT

THE WRIT OF CERTIORARI SHOULD NOT ISSUE BECAUSE THIS COURT LACKS JURISDICTION TO REVIEW THE DECISION ISSUED BY THE SUPREME COURT OF MISSOURI IN THAT THE RULING WAS BASED UPON THE AUTHORITY OF SOURS V. STATE, SUPRA, A RULING WHICH WAS BASED BOTH UPON FEDERAL AND INDEPENDENT STATE GROUNDS, NOR HAS THE STATUS OF MISSOURI LAW BEEN CHANGED BY THE DECISION IN STATE V. HAGGARD, SUPRA.

The Supreme Court of Missouri transferred this case back to the Missouri Court of Appeals on September 23, 1980, which thereafter issued its mandate in accordance with its previously reported opinion. The appellate court held very simply that:

> The armed criminal action and the underlying felony of assault with intent to rape with malice aforethought are the same offense for double jeopardy purposes. Convictions and sentences for both constitutes prohibited multiple punishments. There was in law and fact only one crime. The elements of armed criminal action include all of the elements of assault with intent to rape. Sours v. State, No. 61458 (Mo. banc Jan. 15, 1980). The conviction and sentence for the armed criminal action, therefore, must be reversed. State v. Johnny Williams, __S.W. 2d __, (Mo. App. 1980).

The decision was upheld in State v. Haggard, supra. Since Sours and Haggard were based upon both state and federal grounds, either of which would have been dispositive of the case, the United States Supreme Court has no jurisdiction to review the Missouri Supreme Court's decision in the case at hand. Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed. 2d 965 (1977).

Just as in Sours and Haggard, the instant case involves the question of whether the imposition of punishment for both armed criminal action, Section 559.135, RSMo 1969, and its underlying felony, improperly places the accused twice in jeopardy for the same act. It has been clearly established that in every such instance the question of whether there is multiple punishment is determined by what the legislature intended. Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180 (1932); Gore v.

United States, 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed. 2d 1405 (1958); Iannelli v. United States, 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed. 2d 616 (1975); Simpson v. United States, 435 U.S. 1 (1978).

The Missouri Supreme Court thoroughly examined the question in Sours, supra, and determined first, as a matter of local law, the intent of its state's legislature.

The Sours court discussed the plain meaning of the language used by the legislature in drafting the armed criminal action statute, considered the requirements of Missouri's constitution regarding the construction of the statute, examined Missouri case law and investigated the form of the information or indictment used to charge armed criminal action. Sours, supra. As the court stated, 603 S.W. 2d at 603:

> We have measured the legislature's intent regarding §559.225, RSMo Supp. 1976 (now §571.015, RSMo 1978) by every test and standard available to us under the law of Missouri. The conclusion is inescapable that the Missouri General Assembly did intend to impose punishment for armed criminal action "in addition to any punishment provided by law for the crim committed by, with, or through the use, assistance, or aid of a dangerous (instrument) or deadly weapon." The General Assembly did clearly intend to impose two separate punishments for armed criminal action and the lesser included offense.

That construction of the armed criminal action statute is binding upon this court because the United States Supreme Court lacks jurisdiction to construe state laws. United States v. Thirty-Seven (37) Photographs, 91 S. Ct. 1400, 402 U.S. 363, 28 L.Ed. 2d 822, reh. den. 91 S.Ct. 2221, 403 U.S. 924, 29 L.Ed. 2d 702 (1971); Coleman v. Alabama, 90 S.Ct. 1999, 399 U.S. 1, 26 L.Ed. 2d 387 (1970). As was stated in Memorial Hospital v. Maricopa County, 415 U.S. 250, 256 (1973), "(I)t is not our function to construe a state statute contrary to the construction given it by the highest court of a state. See also, O'Brien v. Skinner, 414 U.S. 524 (1973).

It is of no import that the Sours court went on to also base its decision on federal constitutional grounds.

> It is undoubtedly "'the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails is the non-federal ground is independent of the federal ground and adequate to support the

judgment. Fox Film Corporation v. Muller, 296 U.S. 207, 210, (80 L.Ed. 158, 159, 56 S.Ct. 183)." Cramp v. Board of Public Instruction, 368 U.S. 278, 281, 7 L.Ed. 2d 285, 288, 82 S.Ct. 275.

Jankovich v. Indiana Toll Road Company, 379 U.S. 487, 85 S.Ct. 493, 13 L.Ed. 2d 439 (1965).

In Jankovich, the Indiana Supreme Court invalidated a city ordinance as authorizing an unconstitutional taking without compensation. The decision was based upon both the Indiana constitution and the United States Constitution. This Court held that the ruling was based upon adequate state grounds and therefore dismissed the writ of certiorari as improvidently granted. In the same manner, the writ of certiorari should not issue in the case at hand.

The Missouri Supreme Court based its decision on adequate, independent state grounds.

> This is not a case . . . where the lower court opinion as a whole "leaves the impression that the court probably felt constrained to rule as it did because of (decisions applying the 14th Amendment)," Minnesota v. National Tea Company, supra, 309 U.S. at 554-555, 84 L.Ed. at 922, or "because it felt under compulsion of federal law as enunciated by this Court so to hold," Mississippi ex rel. Southern Railroad Company v. Mayfield, 340 U.S. 1, 5, 95 L.Ed. 3, 8, 71 S.Ct. 1, with the result that the state and federal grounds are "so interwoven that we are unable to conclude that the judgment rests upon an independent interpretation of the state law," State Tax Commissioner v. Van Catt, 306 U.S. 511, 514, 83 L.Ed. 950, 952, 59 S.Ct. 605.

Jankovich, supra, at 443.

In order to follow the established practice of avoiding constitutional decisions where possible, United States v. Simpson, 435 U.S. 6 (1978), the writ of certiorari should not issue because the lower court's decision is supported by adequate state grounds. The Supreme Court's power "is to correct wrong judgments, not to revise opinions." Zacchini, supra, 53 L.Ed. 2d at 970.

This Court's summary dismissal of Brintley v. Michigan, ___U.S.___, 100 S. Ct. 418, 62 L.Ed. 2d 317 (1979), does not require the granting of the petition for certiorari in this case, as Petitioner suggests. An unexplicated disposition of a lower court's decision settles the case for the parties but does not necessarily determint the validity of the lower court's reasoning as expressed in its opinion. Mandel v. Bradley, 432 U.S. 173, 97 S.Ct. 2238, 53 L.Ed. 2d 199 (1977). Brintley, supra, presented the questions whether separate convictions and

consecutive sentences for both a felony and for felony firearm violate the Michigan and the Untied States constitutional prohibitions against double jeopardy. The federal constitutional issue was never reached, however, for the case was decided as a matter of Michigan's highest court construing its own statute in light of its own laws. Michigan is entitled to reach a decision different from that reached by Missouri and the principle involved in the two cases remain unchanged -- since the decisions were reached by ruling upon adequate, independent state grounds, there is no substantial federal question.

Nor is this case controlled by the fact that Sours was remanded for Missouri's reconsideration in light of this Court's decision in Whalen v. United States, ___U.S.___, 100 S.Ct. 1432, 63 L.Ed. 2d 715 (1980).

> The remand of a case by the Supreme Court of the United States to a state court for reconsideration in light of an intervening decision by the Supreme Court does not amount to a final determination on the merits, but indicates that the Supreme Court found the intervening decision sufficiently decisive to compel re-examination of the case.

Henry v. Rock Hill, 376 U.S. 776, 84 S.Ct. 1042, 12 L.Ed. 2d 79 (1964).

The directive that the Missouri Supreme Court consider the reasoning in Whalen, supra, did not mandate a decision identical to the Whalen decision.

> On remand from the Supreme Court of the United States to a state court, such court if free, so far as its own practice allows, to determine any state question involved in the case and any Federal question not already decided by the opinions of the Supreme Court.

Wilson v. Cook, 327 U.S. 474, 66 S.Ct. 663, 90 L.Ed. 793 (1943). Upon the remand of Sours, supra, the Missouri Supreme Court chose to do just that. It decided the issues upon its onw state grounds and went on to also determine the issues upon Federal law.

similarly, in a few cases in which a state court's decision based on state substantive ground was not clearly independent of federal grounds also at issue, the Supreme Court delcined to assume jurisdiction to review the judgment until the state court clarified the basis of its decision. See e.g. Minnesota v. National Tea Company, 309 U.S. 551, 60 S.Ct. 676, 84 L.Ed.

920 (1940); Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 95 S.Ct. 871, 13 L.Ed. 2d 753 (1965); California v. Krivda, 409 U.S. 1068, 93 S.Ct. 549, 34 L.Ed. 2d 520 (1972).

As a further example, in Ohio v. Gallagher, 425 U.S. 257, 96 S.Ct. 1438, 47 L.Ed. 2d 722 (1976), the Supreme Court granted certiorari to determine whether the admission in evidence of statements made by an accused in resopnse to in-custody questioning by his parold officer violates the Miranda rule. The Supreme Court of Ohio had reversed the defendant's conviction, ruling that such evidence violated the accused's privilege against self-incrimination.

This Court fuled that it could not be certain whether the Ohio Supreme Court rested its decision upon its own state's constitution, upon the Federal constitution, or both and therefore vacated the judgment and remanded the case so that the Ohio Supreme Court could further explain. Mr. Justice Stewart wrote a separate opinion by which he dissented from the majority and wrote that:

> It is clear to me that judgment of the Supreme Court of Ohio rests upon both the Constitution of the State of Ohio and the Constitution of the United States. That being so, the writ of certiorari must be dismissed as improvidently granted under the doctrin of Jankovich v. Toll Road Commissioner, 379 U.S. 487, 13 L.Ed. 2d 439, 85 S.Ct. 493.

Ibid. at 725.

The uncertainty involved in the Gallagher case is not present in the instant case. Upon remand, the Missouri Supreme Court clarified its position and specifically ruled that Whalen did not apply. Sours, supra. In Whalen, the issue concerned whether the imposition of cumulative punishments for rape and a killing during the course of the rape was contrary to federal statutory and constitutional law. It was a controversy involving Federal question sfrom its inception and did not involve local law. Sours, on the other hand, rests upon adequate state grounds. Whalen is not, therefore, determinative of this decision.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should not be granted.

Respectfully submitted,

Leonard W. Buckley, Jr. #25161

Leonard W. Buckley, Jr.
1215 Pine Street
St. Louis, Missouri 63103
314/421-1008

Attorney for Respondent
Johnny Williams

Number 81-625

IN THE

SUPREME COURT OF THE UNITED STATES

RECEIVED
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STATE OF MISSOURI,

Petitioner,

-vs-

JOHNNY WILLIAMS, ET AL.,

Respondents.

MOTION TO PROCEED IN FORMA PAUPERIS

Comes now **Johnny Williams** through his attorney, Leonard W. Buckley, Jr., and moves this Court to allow him to proceed in forma pauperis and for his reasons states:

1. That there has been filed with the Supreme Court of the United States a Petition for Writ of Certiorari by the State of Missouri;

2. That Respondent is a citizen of the United States incarcerated in the Missouri Department of Corrections, Jefferson City, Missouri; and without property or money with which to pay the costs of defending on appeal and is unable to pay costs or fees on appeal as more fully appears from the affidavit attached hereto.

3. That the circumstances of this case have not changed since December 10, 1980.

Leonard W. Buckley, Jr.

Leonard W. Buckley, Jr. #27[illegible]
Attorney For Respondent
1215 Pine Street
St. Louis, Missouri 63103
314/421-1008

Subscribed and sworn to before me this 5th day of November, 1981.

Maureen P. White

Maureen P. White Notary Public

My Commission Expires;

MAUREEN P. WHITE
NOTARY PUBLIC, STATE OF MISSOURI
MY COMMISSION EXPIRES 10/17/84
ST. LOUIS COUNTY

Opposition

14

RECEIVED
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SUPREME COURT, U.S.

No. 81-625

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF MISSOURI,
Petitioner,

v.

ROBERT LEE HAGGARD,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
DONALD L. COLLINS,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
STANLEY G. HELTON,
Respondent,

STATE OF MISSOURI,
Petitioner,
v.
RANDY LEE SINCLAIR,
Respondent,

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v.
TIMOTHY CREWS,
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WILLIE TUNSTALL,
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ON PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF MISSOURI

MOTION OF RESPONDENT ROLLAN A. WILLIAMS
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now Rollan Anthony Williams, hereinafter referred to as respondent, by and through his attorney, and moves this Court pursuant to 28 U.S.C. Section 1915 and Rule 46 of the Supreme Court for leave to proceed in forma pauperis for the following reasons:

1. On this date respondent has filed a brief in opposition to granting the petition for writ of certiorari in the above-captioned cause;

2. Respondent is a prisoner in the Missouri Department of Corrections, has no means of income, and is without funds to pay the costs or fees in this cause;

3. Upon a showing of indigency in the Circuit Court of St. Louis County, Missouri, Michael J. Gorla was appointed to represent respondent and has represented him throughout the trial and appeals in state court;

4. Respondent was granted leave to file his appeal to the Missouri Supreme Court in forma pauperis following the judgment and sentence of the trial court;

5. Respondent was granted leave to proceed in forma pauperis by this Court in Case Number 80-997, on May 26, 1981.

6. Respondent's Affidavit in Support of Motion to Proceed in Forma Pauperis is attached hereto.

WHEREFORE, for the foregoing reasons, respondent requests leave to proceed in forma pauperis.

Respectfully submitted,

Michael J. Gorla

MICHAEL J. GORLA, #26399
Attorney for Respondent Rollan A. William
111 South Bemiston, Suite 211
Clayton, Missouri 63105
(314) 721-7980

STATE OF MISSOURI)
) SS
COUNTY OF ST. LOUIS)

A F F I D A V I T

MICHAEL J. GORLA, being first duly sworn upon his oath, states that he is an attorney licensed to practice law in the State of Missouri and is a member of the Bar of the United States Supreme Court. Affiant further states that he represents respondent in this cause and the facts stated in the foregoing Motion for Leave to Proceed in Forma Pauperis are true to the best of his knowledge and belief.

Michael J. Gorla
MICHAEL J. GORLA

Subscribed and sworn to before me this 22nd day of December, 1981.

Catherine M. Dolan
Notary Public

My Commission Expires: 10-7-84

No. 81-625

IN THE

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OCTOBER TERM, 1981

STATE OF MISSOURI,
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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

AFFIDAVIT OF RESPONDENT ROLLAN A. WILLIAMS
IN SUPPORT OF MOTION TO
PROCEED IN FORMA PAUPERIS

Affiant states as follows:

1. I, Rollan Anthony Williams, am filing in this Court, through my attorney, a brief in opposition to granting the petition for writ of certiorari in the above-captioned cause:

2. I am presently incarcerated in the Missouri Department of Corrections under a life sentence imposed upon me on July 27, 1979.

3. I have no means of income and I am without funds to pay the costs of this proceeding or to give security therefor.

4. I have been represented by Michael J. Gorla, an attorney appointed by the Court, throughout the proceedings in state court.

5. I was granted leave to proceed in forma pauperis by this Court in Case Number 80-997 on May 26, 1981.

6. The brief in opposition to granting the petition for writ of certiorari in the above-captioned cause is taken in good faith upon my belief that I am entitled to redress.

Rollan A. Williams
ROLLAN ANTHONY WILLIAMS

Subscribed and sworn to before me this ___ day of DEC 11 19__, 198 .

Robert A. Foreman
Notary Public

My Commission Expires:

ROBERT A. FOREMAN
NOTARY PUBLIC STATE OF MISSOURI
MY COMMISSION EXPIRES AUGUST 1, 1984

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v.

ROBERT LEE HAGGARD,
Respondent,

(listed on first page are twenty-two cases also joined in this petition as per Rule 19.4)

BRIEF IN OPPOSITION TO GRANTING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

Michael J. Gorla
111 South Bemiston, Suite 211
Clayton, Missouri 63105
(314) 721-7980

Attorney for Respondent Rollan
Anthony Williams

STATE OF MISSOURI,
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THE REASONS FOR DENYING THE WRIT

Petitioner contends that the Missouri Supreme Court's decision in Sours v. State, 603 S.W.2d 592 (Mo. banc 1980), which was affirmed in State v. Haggard, 619 S.W.2d 44 (Mo. banc 1981), conflicts with the applicable decisions of this Court including the recent decisions in Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), and Albernaz v. United States, 450 U.S. , 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). Respondent Williams respectfully disagrees and submits that a writ of certiorari should not issue to review the judgment of the Missouri Supreme Court.

In Whalen, supra, the District of Columbia Court of Appeals affirmed the consecutive sentences imposed in a single prosecution for the offense of rape and the offense of felony murder, the killing committed in perpetration of the rape. This Court reversed on the finding that Congress had not authorized consecutive sentences for the two offenses, and thus the trial court had exceeded its authority.

Contrary to the State of Missouri's argument in its petition for certiorari, the majority opinion in Whalen did not conclude that a defendant can be punished in one proceeding for two crimes if the legislature so intends where both offenses are considered the same offense under the test articulated in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Petitioner bases its interpretation of Whalen on language contained in the concurring and dissenting opinions. It appears that such a view may be held by the Chief Justice, Justices White, Rehnquist and Blackman, but the fact is the majority in Whalen made it clear that it was basing its decision on statutory interpretation and not on constitutional grounds. Since this Court found that Congress did not intend to punish a defendant both for rape and the killing committed in the perpetration of said rape, the Whalen case was disposed of without resort to the application of the double jeopardy clause of the Fifth Amendment.

The Missouri Supreme Court correctly interpreted and applied Whalen in Sours v. State, 603 S.W.2d 592 (Mo. banc 1980). After examining the legislative intent behind the armed criminal action statute, §559.225 RSMo. Supp. 1976, and applying every possible test and standard available for statutory construction, the Missouri Supreme Court concluded that the "General Assembly did clearly intend to impose two punishments for armed criminal action and the lesser included offense." Sours v. State, supra, 603 S.W.2d at 603. The statutory interpretation which was dipositive of the issue in Whalen does not solve the problem in Sours.

Likewise, the case of Albernaz v. United States, supra, does not mandate that the Missouri Supreme Court change its decision in Sours v. State, supra. In Albernaz, this Court addressed the issue of whether the double jeopardy clause of the Fifth Amendment was violated by the imposition of consecutive sentences for the offenses of conspiracy to import marijuana, and conspiracy to distribute marijuana. Applying the Blockburger test, this Court concluded that there was not a double jeopardy-multiple punishment problem since each offense requires proof of a fact which the other did not, and thus, said offenses are separate and distinct. Countary to the view adherred to by the petitioner, the Albernaz decision was not based on the conclusion that when the legislature so intends, multiple punishment can constitutionally be imposed for two offenses in spite of the fact that said offenses are considered the same offense under the Blockburger test. Since the offenses of armed criminal action and its predicate felony are the same offense under Blockburger v. United States, supra, this Court's decision in Albernaz is not applicable to the Missouri Supreme Court's decision in Sours v. State, supra.

Petitioner also contends that the Sours and Haggard decisions conflict with this Court's summary dismissal in Brintley v. Michigan, 444 U.S. 948, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979). As set out in the State of Missouri's petition at page 8, the following question was sought to be presented in Brintley:

"Does double jeopardy clause prohibit separate convictions and sentences for violation of state statute, §750.227(b), proscribing possession of firearm during commission of felony and for underlying felony (armed robbery in one case and second degree murder in another), where all proofs required to establish violation of underlying felony are necessarily required for proof of violation of §750.227(b) where there is no evidence that weapon has been possessed for any other purpose than the commission of underlying felony, where underlying felony is specifically charged as a felony element of firearms possession charge, and where (in armed robbery case) state has already augumented punishment for armed robberies above punishment imposed for unarmed robberies. 26 Crim.L.Rep. 4113 §750.227(b), M.C.L.A. appears in Appendix D of State's Petition).

What is not pointed out in the petition for certiorari is that in Wayne County Prosecutor v. Recorder's Court Judge, 406 Mich. 374, 280 N.W.2d 794 (1979), one of the cases consolidated in Brintley, the Michigan Supreme Court determined that the Michigan felony firearms statute and the underlying felony were distinct and separate offenses. This Court is bound by the construction of a state statute by the highest court of a state, Memorial Hospital v. Maricopa County, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1973), and thus, this Court's dismissal for no substantial federal question in Brintley was warranted by the Michigan Supreme Court's finding that the felony firearms statute and the underlying felony are not the same offense. As stated earlier herein, the Missouri Supreme Court in Sours v. State, supra, has determined that armed criminal action, and the underlying felony are the same offense, and so, this Court's summary dismissal in Brintley is inapplicable to the situation in Missouri.

Finally, petitioner contends that Sours and Haggard conflict with the decisions of this Court interpreting the meaning and scope of the double jeopardy clause of the U.S. Constitution. The Missouri Supreme Court has set out a complete and thorough analysis of the law in this area, and its analysis correctly interprets and applies the decision of this Court. Sours v. State, supra, 603 S.W.2d at 603-606. Said analysis emphasizes that this Court has consistently stated that the double jeopardy clause of the U.S. Constitution serves three purposes. First, it protects against a second prosecution for the same offense after an acquittal. Second, it protects against a second prosecution for the same offense after a conviction. Third, it protects against multiple punishment for the same offense.

North Carolina v. Pearce, 395 U.S. 711 89 S.Ct. 2072, 23 L.Ed.2d 656; Brown v. Ohio, 432 U.S. 161 97 S.Ct. 2221, 53 L.Ed.2d 168 (1977); Harris v. Oklahoma, 443 U.S. 682 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977); Illinois v. Vitale, 447 U.S. 410, 100 S.Ct. 2260 65 L.Ed.2d 2228 (1980).

While petitioner contends that the above authorities only apply in situations involving successive prosecutions and that the legislature can authorize punishment in a single proceeding for both an offense and a lesser included offense, such is not correct. While the first two purposes of double jeopardy deal with the problem of successive prosecutions, the third purpose does not. In fact, if the multiple punishment protection dealt only with sucessive prosecutions, then the third purpose would be nothing more than a restatement of the other two. The protection against multiple punishment for the same offense would be rendered useless were the state able to do in one prosecution what it cannot do in two prosecutions. Regarding the petitioner's contention that the legislature can constitutionally authorize punishment for both an offense and a lesser included offense, if that were true, the protection against multiple punishment, which was recently cited with approval in Illinois v. Vitale, supra, would become a nullity.

As stated earlier, the Missouri Supreme Court has decided that armed criminal action §559.225 RSMo. Supp. 1976, and the underlying felony are the same offense, and that the Missouri legislature has intended to separately punish both offenses. This court is bound by the Missouri Supreme Court's interpretation of Missouri statutes. Memorial Hospital v. Maricopa County, supra. Therefore, applying the teachings of this Court, to prosecute and convict a defendant of both armed criminal action and the underlying felony constitutes multiple punishment for the same offense in violation of the double jeopardy clause of the Fifth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, respondent submits that petitioner's writ of certiorari be denied.

STATE OF MISSOURI)
) SS
COUNTY OF ST. LOUIS)

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SUPREME COURT, U.S.

A F F I D A V I T

Comes now Michael Joseph Gorla, duly deposed and sworn, and states as follows:

1. I am an attorney licensed to practice law in the State of Missouri, and a member of the Bar of the United States Supreme Court.

2. I have been appointed in the Circuit Court of St. Louis County, State of Missouri, to represent Rollan Anthony Williams, both at his trial and on appeal. I represent Mr. Williams as a respondent in State of Missouri v. Robert Lee Haggard, et al., Case Number 81-625, docketed September 24, 1981.

3. On December 22, 1981, respondent Rollan A. Williams placed in the mail at the United States Post Office in Clayton, Missouri, the appropriate number of his brief in opposition to the State of Missouri's petition for writ of certiorari in Cause Number 81-625 addressed first class postage prepaid, to the United States Supreme Court in Washington, D.C. Respondent also placed in the mail one copy of the brief in opposition addressed, first class postage prepaid, to each attorney of record in Cause Number 81-625:

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Attorney General
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Kansas City, MO 64112

4. Pursuant to Supreme Court Rule 28.2, respondent submits this affidavit to show timely filing and proper service.

Michael J. Gorla
MICHAEL J. GORLA

Subscribed and sworn to before me this 22 day of December, 1981.

Catherine M. Dolen
Notary Public

My Commission Expires: 12-7-84